

Lately Printed for J. Walthoe.

THe Pleadings and Arguments of *Mr. Finch* and *Sir Robert Sawyer*, the Kings Solicitor and Attorney General; and *Sir George Treby*, the Recorder of *London*, and now Lord Chief Justice of the *Common Pleas*, and the late Chief Justice *Pollexfen*, for the City of *London*; with the Judgment Entred thereupon. The whole Proceedings faithfully taken from the Records. Wherein is comprized all the Learning of Corporations, whether Forfeitable, how, and for what; and whether a Corporation can be surrendered. Which Points do not only concern the City of *London*; but all other Corporations in *England*. In Folio, price 6 s.

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T H E Compleat Sheriff:

Wherein is set forth,
His OFFICE and AUTHORITY;

With Directions, how and in what manner to Execute the same, according to the Common and Statute Laws of this Kingdom, which are now in force and use: And the Judgments and Resolutions of the Judges in divers late Cases, in the several Courts of *Westminster*, relating thereunto.

Likewise of *Under-Sheriffs* and Their Deputies; and where the *Higb-Sheriff* shall be Answerable for their Defaults, and where not, &c.

Together with the Learning of

Bail Bonds; with an Explication of *Stat. 23 H. 6. cap. 10.* and Pleadings thereon.

Retorns of Writs, Remedies against *Non Return* and *Faux Return*, *Habeas corpus*, *Venires*, Challenges and Enquiry of Damages. Prisoners and Prisons. Execution by *Fieri fac'*, *Elegit*, &c.

Escapes, Actions and Pleadings therein. Fresh Pursuit, and other Pleas. Attachment, Amercement: Actions, Declarations and Pleadings on the Sheriffs *Non-fesance* or *Male-fesance*. Customs of *London*, as to Prisons, Courts, Process, Sheriffs Fees, Extortion, Sheriffs Accompts, &c.

To which is added, The Office and Duty of *Coroners*.

—Deus nobis hæc otia fecit.

London, Printed by the Assigns of R. and E. Atkyns, Esquires; for John Walthoe, and are to be sold at his Shop in *Vine-Court*, *Middle-Temple*. M DC XC VI.

THE HISTORY OF THE CITY OF LONDON

By WILKINSON GIBBS
OF THE MIDDLE TEMPLE
ESQ; OF THE INNER TEMPLE
OF THE BARR

IN TWO VOLUMES.
LONDON:
Printed by J. KNEELAND, at the
Sign of the Anchor, in St. Dun-
stons Church-yard, near
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the Parish of St. Dunstons,
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MDCCLXXII.

The PREFACE.

WHEN Sir *Edward Coke* in his first *Institutes*, fo. 168. tells us, That the Sheriff hath *Triplicem Custodiam*: (1) *Vita Justitiæ*. (2) *Vita Legis*. (3) *Vita Reipublicæ*, he thereby gives us a short, but pithy Description of this Important Office. And if *Execution* be the Life of the Law (as without doubt it is) it seems to be seated in the Sheriff, as 'in the Heart, which is *primum vivens*, and *ultimum moriens*. Original Process moves and is directed to him; Subsequent Proceedings are Circulated in him, and at last are Finished and compleated by him.

This gives us to Understand, not only the Importance, but the Extensiveness of the Sheriffs Office. Especially when we Consider how many Thousands of Families have Suffered irreparable Ruin by the Ignorance or Carelessness (not to say worse) of *Sheriffs* and their Officers; Nay, they

A 2

them-

The Preface.

themselves failing in the due discharge of their Duty, have oftentimes rendered themselves *Obnoxious* to chargeable Payments and difficult Defences.

Certainly then, to understand well the Law about *Sheriffs*, and their fit Management and Demeanor in all the Branches and Circumstances relating to their Office, is a thing of as great Consideration as any that can be propounded to us, as Members of a Body Politick.

We have indeed many that have Treated of some Parts thereof (*inter alia*) as *Crompton, Kitchin, Greenwood, &c.* But I know but two that have designedly Undertaken this Title.

Mr. *Dalton* (a Person of Great Learning and Industry) has discovered much Reading in our Old Books, and is also of very great use to direct us in *CASES* that may seldom and rarely happen; and yet there is much of him now Antiquated, and diverted into other Channels. The Receiving *Fee-farm Rents, Waifs, Estrays, Deodands,*

The Preface.

Deodands, Wards bona Felonum, &c. seldom or never troubling the Sheriff, having been Extinct or Aliened by Act of Parliament, or granted to Lords of Mannors, or other Persons.

Besides, some things are there delivered for Law, and so might pass in his time, which have received quite contrary Resolutions; and Thousands of Cases have hapned since, which are not to be found in him, nor in the least mentioned by him. Neither has he been so happy as we could wish, to Treat Methodically of *Rescousers, Escapes, &c.* which make a great Figure in our Books; and he has totally omitted (unless it be *sparsim*) the proper Remedies against the *Non-feasance* or *Male-feasance* of the Sheriffs and their Officers. I have, in many Titles, directed you to refer almost wholly to him, as not being willing to Transcribe them; but they are such as are Common, and known of course, or else seldom or never practicable.

Mr. Wil-

The Preface.

Mr. *Wilkinson* is (for so much as he hath Undertaken) Neatly and Judiciously done: But as to the Office of *SHERIFFS*, tho' the Book bears that Title; yet it is the least part thereof, not exceeding above Four printed Sheets; so that we cannot think, that sufficient Direction to us. Nor have either of them given any Directions as to the Laying of *Actions, Declarations, Pleadings, and Trials or Evidence*; and therefore I have been the more careful to place them under their proper Titles.

Upon these Reflections, it seems not Unreasonable to imagine, That a Treatise of this Nature may find some Acceptance, and meet with a favourable Reception, as well from Gentlemen (who are, or may be capable for this weighty Office, and thereby be better enabled to Serve their King and Country, and also Themselves) as from the *Students and Practisers* of our Common Law.

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THE
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SHERIFFS, &c.

CHAP. I.

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THE Sheriff and the County being Correlata, I shall first give a few Observations about Counties; what they were Originally.

B

Counties

THE

The Office and Duty of Sheriffs, &c.

Counties.

Counties (a word taken from the *French*,) or *Shires* (a word taken from the *Saxons*,) are certain Circuits and Parts of the Kingdom, into which the whole Realm was divided for the more convenient Government thereof, and is Governed by a yearly Officer, which we call **SHERIFF**, which is compounded of two Saxon words, *Shire* and *Reeve*, *Reeve* signifying *Præpositus*, or *Governour*.

When this Realm was divided into Counties.

1 Inst. 168.

Comites, Vicomites.

As for the Time when and by whom this Realm was divided into Counties, Authors seem to differ. *Coke on Littleton*, fo. 168. holds, that they were divided by the *Britains*; but it is generally held (as *Ingulph, &c.*) that they were divided by King *Egbert* or *Ælfred*: But tho' *Egbert* united the *Heptarchy*, yet he was not the first that divided the Kingdom into *Counties*, nor *Ælfred* neither, as some imagine. For as Mr. *Selden* observes, about the Year 700 (an hundred years before *Egbert*) one of *Ina's* Laws was; If any *ſchepman*, i. e. Sheriff were guilty of an Escape, *perdat Comitatum suum*. Therefore *Ingulphus* meant that King *Ælfred* did divide it into Hundreds, or else made a more punctual Division than was before. Now it appears that the Earls of the Counties, had the custody and guard of the Counties long before the Conquest; and when the Earls left their Custodies, then was the Custodies of Counties committed to *Viscounts*, and they are thereupon called *Viccomites*, *quia vices Comitis supplent*. And we seem to derive all this from the Romans; for what we call *Comitatus*, was by them called *Consulatus*, and what the Saxons afterwards called *Shpieve*, or *Earl*, the Romans called *Consul*; and the Sheriff was Deputy of the Consul or Earl, and the Romans called him *Viceconsul*. 1 Inst. 168. *Dugdale Antiq. War. Pref.*

In

Chap. I. His Power and Priviledge, &c.

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In 2 *Bulstr. Chune and Pyots Case*, *Coke arguendo*, seems to be of Opinion, that there were no Earls before the Conquest. But the meaning is, there was no Hereditary Earl; but he that had the Office, had it at the pleasure of the King. For in the Preface to his Reports, the Third Part, he is of Opinion, there were *Sheriffs* 3 Rep. Pref. time out of mind before the Conquest; and if so, then *Earls* were. He gives an undeniable Argument, for that the *Trials per Juries*, which were always Returned by the *Sheriffs*, were before the Conquest, even as appears by *Doomsday-Book*. Now we know that *Viscounts* were not Created till the Time of H. 6. *Sed distinguendum, &c.* *Viscount* signifies a Title of Honour, or an Office of Trust. As a Title of Honour it is of late standing; but as an Office of Trust, (*viz.*) for the Government of the County, it was time out of mind. And this difference I ground upon *Cambden* in his *Britannia*: *Viscount* (saith he) *hæc vetus Officii, sed nova Dignitatis appellatio.* 9 Rep. in *fine de Lewes's Case*. *Viscounts* Original.

The Sheriff at Common Law was Eligible by the County, as the Coroner is at this day; and then by the Death of the King his Office was not determined, no more than the Coroners are now. 2 *Brownl.* 282. *Chamberlain and Goldsmith.* *Sheriffs* in *Ancient* times *Eligible* by the *County*.

But by *Stat. 14 Ed. 3. c. 7.* & 21 H. 8. c. 20. the Judges are to nominate Three persons of every County to be presented to the King, that he may prick one of them, which by the Statute is to be done 3 *Novemb.* being *Craftin. Animarum*; and yet *An. 16 Car. 1.* because the 3d of *November* was the first day of the Parliament, and the Lords were to attend upon the King, it was Resolved by the Judges, that it might be well put off till another day; and the Lord Keeper deferred it till the 6th of *November.* *Cro. Car.* 595. *How Chosen* at this *day*, and *when*.

The Office and Duty of Sheriffs &c.

Dyer 225.
Acts of
Grace, how
to be con-
strued.

But the Statute of 9 Ed. 2. restrains not the King's Power at Common Law; but the King may constitute a Sheriff without Election, or grant it in Fee; and he may still make Sheriffs without the Judges, *Dyer* 225. for all Acts of Grace flow from him. As *Dyer* 211. the Commission of Trial of *Piracy* upon the Statute of 28 H. 8. is good, tho' the Chancellor does not nominate the Commissioners as the Statute appoints, &c. And the Reason is given by my Lord *Hobart*. *Hob.* 14. b. *Colt and Glover's Case*, & 214.

These Statutes, and the like, were made to put things in ordinary Form; and to ease the Sovereign of Labour, and not to deprive him of Power. The Election being meerly in the King, and the Office Ministerial only.

The Honour, Power
and Privilege of
Sheriffs.

I will now set down some General Observations of the great Honour, Power and Privilege of *Sheriffs*, and wherein and by what Acts he is restrained.

One calls it *Judiciaria dignitas*. *Fortescue* saith, *Savil* p. 43. that *Vicecomes* is *Nobilis Officiarius*. In *Savill's Rep.* p. 43. he is called a *Royal Officer*: For (saith the Book) *Charters of Liberties granted to the Barons of Cinque Ports and other Inhabitants, shall discharge them for Inferiour Offices, as Constable, &c. but not of Offices Royal, as Sheriff.* 1 *Roll. Rep.* 274. *Phelp's Case*.

Takes
place of
Noble-
men.

The Sheriff takes place of every Noble-man in the County, during the time that he is Sheriff. And tho' the Sheriff be not a Justice of Peace, yet he is a Conservator of the Peace, and by this he may well imprison a man upon good Cause. 2 *Roll. Rep.* 237-

Fitzberbert N.B. 81. b. at Common Law the Sheriff may Commit any one for the Breach of the Peace.

Such

Chap. I. His Power and Priviledge, &c.

5

Such Persons as he shall apprehend upon suspicion of Treason, or Felony, upon fresh Suit or Hue and Cry, he may commit to the Gaol. He may commit all Affrayers or Breakers of the Peace in his presence.

Upon any Foreign Invasion he may raise the County; so upon Rebellions and Insurrections; and may command any Number he thinks fit to aid him.

But of his own Authority he shall not Arrest any man upon suspicion of Felony; except there be a Felony committed in Fact, and he himself have suspicion of him.

By Stat. 17 R. 2. c. 8. the Sheriff may raise the *Posse Comitatus* to suppress Rioters and commit them to Prison, 13 H. 4. c. 7. and if the Rioters resist, the Sheriff and his Assistants may justify the killing them. Vide the Stat. 13 H. 4. c. 7. and the Stat. of Northampton. 2 Ed. 3. c. 3. for this purpose, & 13 Ed. 1. c. 39.

Wheresoever the Sheriff, or any other of the Kings Officers may take *Posse Comitatus*, or have Authority either to execute the Kings Process, or apprehend Felons, Rioters, &c. if they shall find Resistance, they may arrest and imprison all such Offenders.

He hath *Custodiam Comitatus*, and therefore for Cause he may commit: He is *Conservator Pacis*. Stat. 1 Mar. c. 8. doth not take away Power from the Sheriff; only, if he was in Commission of Peace before, he was to forbear the execution of his Commission for the Peace so long as he is Sheriff; but he is not to forbear the execution of that which is committed to him for the County.

What the Sheriff may do as *Conservator Pacis*. Tho' not to act as Justice of the Peace for that year.

The Sheriff, if he see a person carry Weapons in the Highway *interrorem populi*, he may commit him, tho' he do not break the Peace in his presence.

The Sheriff
favoured
in the Exe-
cution of
his Office.

Justificat-
en faux
Imprison-
ment.

Bishops
and Sheriffs
went Cir-
cuits.
The Office
of Sheriff
entire, and
not to be
apportion'd

Sheriffs
favoured
in Law.

sence. The Lord Coke cited the *Mayor of Barstaple's Case*, in *Chune and Piott's Case*, 2 *Bulstr.*

Now the Case of *Chune and Piott* was this :

One *Clare* was committed to the Compter of *Woodstreet*, and made his Escape; the Defendant being one of the Sheriffs pursued him, and in his pursuit met with the Plaintiff in the Night time *vagrantem*, who pursued him indecently, and gave him uncivil words, & *detrusit ad murum*; whereupon he Imprisoned him, and Justifies in *faux Imprisonment*. He doth not say, he did it *violenter*, or *contra pacem*, or *sciens*, knowing him to be Sheriff: But *per Cur'*, it shall be intended he did it *malitiosè*, and the Law implies it was done *vi & armis*. It's a good Justification. Had the Defendant done it by chance and unwillingly, he might have pleaded it, and his not pleading it shews it to be otherwise, 2 *Bulstr.* 329. But the *Mayor of Barstaple* Justified the committing a man, for that he did misbehave himself against him by ill Words, &c. Had this been laid to be done in the execution of his Office, it had been good; but he was then playing at Tables.

Anciently the Bishop, with the Sheriff, went in Circuit twice every year, through every Hundred within the County, 2 *Inst.* 70.

The King cannot restrain any part of the Sheriff's Power, neither can the King choose a Sheriff contrary to the Statute of *Lincoln*. The Office of Sheriff is entire and cannot be apportioned. Tho' the King constitute a Sheriff *durante beneplacito*, and may determine it at Will; yet he may not determine it in part, nor abridge him of any thing incident to his Office. *Hob.* p. 13. 2 *Inst.* 501. 4 *Rep.* 32. *Milton's Case*.

The Sheriff is an Officer of that Eminence, Confidence and Charge, that he ought to have all Right pertaining to his Office, and ought to be

be favoured in Law before any Private person.
I shall give you some Instances. 4 Rep. 33. b.
Mitton's Case.

Inasmuch as Escapes are so Penal to Officers, the Judges have always made as benign Construction as the Law will permit in favour of them, and to the intent that every one may bear his own burden, they will never judge an Escape by strict Construction. As if one in Execution escape and fly into another County, and the Sheriff retake him on Fresh pursuit, its no Escape, if it be before Action brought. So if the Sheriff by *Habeas Corpus* be commanded to bring the Body at the day, he shall not be compelled to take the most direct way, but the safest. *Vide infra.*

The Sheriff is not punished for executing the Process of the Court, tho' it were erroneous. *Vid. postea.*

If any Sheriff, Under-Sheriff, Serjeant or Officer, who hath execution of Process, be slain in doing his Duty, its Murder in him who kills him, altho' there were not any former Malice between them; and if there were Error in awarding of Process, or in the mistake of one Process for another; as a *Capias* in Debt against a Peer; and an Officer be slain in the execution thereof, the Offender shall not have advantage of such Error, no more than a Sheriff who suffers a Prisoner to escape, shall take any advantage of Error thereby. And in this case there needs not a Special Indictment to be drawn; but a General Indictment, that such a party *ex malitia sua præcogitata percussit, &c.* for the Law presumes Malice, tho' none be proved; so it is if any shall come in aid of them; and an Officer, if he be resisted, is not bound to fly to the Wall, as other Subjects are.

Escape, not to be judged strictly.

The Sheriff not punishable for executing erroneous Process. Killing of the Sheriff in doing his Duty, is Murder.

Cro. Jac. 279. Maskely's Case.

9 Rep. *Maskely's Case.*

Severe
Fines for
assaulting
the Sheriff.

Cro. Car.
251. B. R.
Le Roy
versus Sir
J. Wingfield
and Others.

Several Persons were informed against, for assaulting the Sheriff in serving Execution, and fined Sir J. Wingfield the Prisoner at 500 l. and Brady 500 Marks, because it appeared upon the Evidence he drew his Sword and wounded the Sheriff, and by that means the Prisoner escaped into Neale's House, and 180 l. against Neale, because he kept out the Sheriff, and shut the Door against him, and 500 l. against Sir T. B. because he was the means of conveying away the said Prisoner to *Lincolns Inn*; and *per Cur'* such Fines assessed in Court by Judgment on Information, cannot be afterwards qualified or mitigated.

Assistants
to the Sher-
riff, or his
Bayliffs.

The Sheriffs Bayliffs lawfully arrested a man, if the persons which stood by refuse to assist them, (in case of Opposition) they shall be fined. *Winch. p. 72 Foster's Case.*

2 Inst. 193.
sur Stat.
W. 1. c. 17.
Fine for
Non-resis-
tance.

Every man is bound by the Common Law to assist, not only the Sheriff in his Office, for the execution of the Kings Writs, according to Law; but also his Bayliff that hath the Sheriffs Warrant in that behalf, hath the same Authority which his Master hath: For the Sheriff cannot do all himself, and if they do it not, being required, they shall be fined and imprisoned; but in the case of *Replevin*, out of a Castle, House, &c. before the Sheriff useth any Force, he ought to demand (according to Law) the Goods to be delivered, so as *Replevy* may be made thereof; for *sequi debet potentia mandatum Legis, non precedere.*

The Sher-
riffs Letters
Patents of
Assistance.
Id. ibid.

Now besides the Warrant of the Common Law, the Sheriff has his Letters Patents of Assistance, whereby the King commandeth, that all Archbishops, Bishops, Dukes, Earls, Barons, Knights, Freemen, and all other of that County, be to the Sheriff thereof in omnibus quæ ad Officium illud pertinent, intendentes, auxiliantes & respondentes.

As

Asto the Sheriffs power in breaking up Houses, Sheriffs power to break up Houses. Moore 66.
vid. infra Tit. Execution. Only I shall observe on Proceſs for the Good Behaviour, the Sheriff may break an Houſe to take the Party, as if the Sheriff have a *Cap* against one, to find Surties of the Good Behaviour.

The Sheriff or his Ministers in the Execution May carry of Justice, may carry a Dag or Hand-gun, Weapons. and its no offence against the Statute. *Cro. El.* 822. *Gardne's case*, & 5 *Rep.* 71.

The Sheriff in ſome Caſes ſhall not be a Diſſei- In what Caſes the Sheriffs Officers excuſed from doing wrong. 6 Rep. 52. in fine Boſwells caſe.
 ſor for executing the Kings Writ, tho' he doth wrong, for Officers in ſuch Caſes are excuſed by their Warrant. As it was found *ex officio*, that the Church was full of *B.* who was a ſtranger to the *Quere Impedit*, and it appears no that he had better Title; yet the Plaintiff ought to have a Writ to the Biſhop generally. So it is of a Sheriff on *Habere fac' ſeiſinam* of Land, for it cannot come in Iſſue between the Demandant and him, for he had no day in Court; and tho' a third perſon had Right, they are excuſed by their Warrant.

If the Sheriff be reſiſted in executing the Poſſe Comitatus. Kings Writs or Proceſs of Law, he may take the *Poſſe Comitatus*; ſo he may to ſuppreſs Ri- 3 Inſt. 161. *oters. Vid. Supra.*

As for other Judicial Office of the Sheriff, as Enquiry of Waſt, Rediſſein, &c. *vide* under their proper Titles. By the Statute 21 *Jac. c.* 13. the Life 1 Keb. 176. of the Party abſent, during whoſe Life the Defendant had a Leaſe, is to be enquired by the Sheriff.

Per Sat. 23 *Eliz.* A Recuſant Convict ſhall 2 Keb. 108. Le Roy & Webb. after Proclamation at the Aſſizes or Gaol Delivery render his Body to the Sheriff, before the next Aſſizes.

But notwithstanding the Dignity and Favour The Sheriff in what things reſtrained.
 the Law caſts on Sheriffs, yet in many places they are reſtrained, and have limited qualifications, which

The Office and Duty of Sheriffs, &c.

which would further contribute to the explicating the nature of the Sheriffs Office.

Not to be
chosen a
Parliament
Man.

Lit. rep. 326
Walt. Longs
Case.

The Sheriff of the County is not to be chosen a Parliament Man. *A. 12 Jac. 1.* Sir George Selby was made Sheriff of *Durham*, and Elected Knight for *Northumberland*; it was resolved in Parliament, that the Election was void.

Mr. *Walter Longs Case* was warmly argued, he was informed against first, That he being made Sheriff of the County of *W.* and having taken the Oath to be dwelling in his County all the year, unless he had Licence of the King, had committed Perjury, in as much as he was absent out of the County three Months together. He said he was Elected Burgess for *Bath*, and by vertue of a Writ of Summons under the Great Seal, which he conceived amounted to a Licence. The Statute is *4 H. 4. cap. 5.* every Sheriff shall dwell in his proper person in his Bayliffwick for the time that he shall be Officer; the words are *Demurrant*, not *Abiding*. The King by Will may Elect one of the House to be Sheriff, for this is a Dispensation; but it appeared Mr. *Long* sought to be Elected Parliament Man. *Quare* how it was resolved in the *Star-chamber*.

Shall not
serve above
one year.
Non ob-
stante.

1 H. 7.
7 Rep. 14.
Calvins
Case.
12 Ed. 4.
c. 1.

By the *Stat.* of *23 H. 6.* no Man shall serve the King as Sheriff of any County above one year, and that notwithstanding any Clause of *Non obstante* to the contrary; that is, notwithstanding the King should expressly dispense with that Stat. And yet 'tis agreed, that against the express purview in the Act, the King may by a Special *Non obstante* dispense with that Act, (except such as are Inheritable to the Office of Sheriff or other Offices in *London*.) Yet they may execute their Office during *Mich.* and *Hillary* Term, if no Writ of Discharge come.

Every

Chap. I. In what cases restrained.

II

Every Sheriff is to be resident in his own person, within his County during the time he is Sheriff, (except he be otherwise Licensed by the King.) p. 4 H. 4. c. 5.

A Sheriff of one County hath no Authority, or Power within another County; yet the Sheriff by force of the Kings Writ may carry the Prisoner through several Counties, or make fresh pursuit into other Counties, and the Prisoner shall be said to be in the Custody of the first Sheriff, in every County. One Sheriff hath no power in another County:

The Sheriff is not to Let his County to Farm Not to Let his County to Farm.
per Stat. 23 H. 6. c. 10. By the Sheriff's Letting his County to Farm, is understood of the *provincia Comitatus*, which was considerable, when most Law Suits were transacted in the Counties, and in Hundred Courts, Fines Issues and Amercements being considerable. And in the time of H. 3. the *Bayliffwick* of one County was Let at 100 l. *per annum*, a great Sum in those days. There was a Bond for Rent, on a Lease of the *Bayliffwick* of the *Sarvoy*. Now the *Stat. 27 H. 8. c. 24.* being a general Statute, and the conclusion 3 *Keb. 678.*
 general *contra formam Statuti*, will avoid this Contract, *Ellis and Nelson.*
per Stat. 23 H. 6. The Security is void, tho' it hath no express words to avoid it; but *per Curiam*, *23 H. 6.* being a particular Law should have been pleaded, and the *Stat. 27 H. 8.* is but a Relative Statute. *Per Stat. 4 Ed. 3. c. 9.* The Sheriff shall not Let Hundreds to Farm. It was resolved in *Stockwith and North's Case*, that the setting to Farm Offices was *malum prohibitum*, Nor hundred. *Mere W. 1021.*
 against the *Stat. of 4 H. 4. c. 5.* and also *malum se.* *Stockwith and North.*
 And therefore, because the Sheriff of *Nottingham* took Money for the Gaolership, and the *Bayliffwick* of the County for one year, he was fined in the *Star Chamber*. The penalty for offending these Laws are 40 l.

Tho'

Guilty of
Homicide
if he put a
Condemn'd
man to
death con-
trary to or-
der of Law.
* What
prescription
by a Sheriff
good or
not.

42 Ed. 3. 5.
21 H. 7. 17.
A.

Tho' the Sheriff be so much favoured and respected in the Law, and in the very Execution of Criminals; yet he shall be Guilty of Homicide, for not observing the Order of Law, in putting a Condemned man to death. 7 Rep. 13. 1 Jac.

* A Sheriff may not prescribe, that he and all those who have been Sheriffs have been seized of a certain Gift at every Turn held, &c. for the Sheriff is put in by the King every year, and removeable at pleasure. But in 21 H. 7. 17. b. an Under-Sheriff prescribes, that he and all Under-Sheriffs of the County, have used to have so much for *Bar Fees*, and admitted good.

C H A P. II.

What the Sheriff must do at the Entrance into his Office. The Form of the Writ of Discharge of the Old Sheriff. The Form of his Oath, how and before whom to be taken, and the Return. The Cities and Towns in England which have Sheriffs, and how many each. Of delivery of Writs and Prisoners by the Old Sheriff to the New. Till what time the Old Sheriff, or his Officers may Act. What's to be done in the Case of the Kings Death. What shall be said at good delivery of Prisoners, and how to be made. The Form of the Indenture setting over the Prisoners, and the Writs. The Form of the Return of those that have been Executed by the Old Sheriff. What Acts may or must the Old Sheriff do after his Discharge, and what remedy against him for a Misdemeanor in his Office. When and where the New Sheriff must Read his Patent, and make his Deputies in the Countie and Courts above. How and in what Cases his Office is determined before the year be out.

HE must go into the Remembrancer's Office in the Exchequer, to Enter the Recognizance with Sureties, (or some for him) with Condition for payment of his Proffers or Accompts which is twice in the year, (*viz.*) at or before *Mense Pasch' & Mense Michaelis* then next following. Then his Attorney or some other will write him a Note, signifying that he is Sheriff of such a County, and hath entred into Recognizance; the which Note the Sheriff must deliver to one of the six Clerks in *Chancery* to make his Patent by, with a Writ of Assistance, and a Writ of Discharge to be delivered to his Predecessor, who should be Delivered with all speed to his Predecessor, for the benefit of his Under-Sheriff; because
till

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till it be livered, the Precedent Sheriff may do Execution of all Proceſs.

As to the Forms of theſe two Patents, (*viz.*) the Patent of his Office, and the Patent of Aſſiſtance, *Vid. Dalton.*

But the Form of the Writ of Diſcharge directed to the Old Sheriff is this.

Willielmus, &c. dilect' fib. J.S. Armig' nuper Vic' Warr' salutem. Cum conceſſerimus Dilecto, &c. nobis A.B. Armig' Comitatum noſtrum prædict' cuſtodienſ', quamdiu nobis placuerit, prout in Literis noſtris patentibus ei inde conceſſ' plenius continetur, Tibi præcipimus qd' eid. A.B. Com' noſtr' præd' cum pertinentiis una cum Rotulis Brevib' Memorand' & omnibus aliis ad officium Vicecom' præd' ſpectan' quæ in cuſtodia tua exiſtunt per Indenturas inde inter te & præfat' A. B. debite conficiend' liberes Teſte meipſo apud Weſt' quinto die, &c.

In the next place, he may go to a Maſter of the Chancery, or to one of the Judges of Aſſize of that County whereof he is Sheriff, and take the Oath of Supremacy by the Stat. of 1 El. c. 1. 5. Eliz. c. 1. And alſo an Oath for the due Execution of his Office, which is as follows.

The Sheriffs Oath.

YE ſhall Swear, that you ſhall ſerve the King well and truly in the Office of Sheriff of A. and do the Kings Profit in all that belongs to you to do by way of your Office, as far forth as you can or may. Ye ſhall truly keep the Kings Rights, and all that belangeth to the Crown. Ye ſhall not aſſent to Decrease, to Leſenings

senings or to Concealments of the Kings Right,
or of his Franchises; and whensoever ye shall
have knowledge, that the Kings Rights, or the
Rights of his Crown be concealed or withdrawn,
be it in Land, Rent, Franchise or Suits, or any
other things, Te shall do your true Power to
make them be restored to the King again; and
if ye may not do it, ye shall certifie the King,
or some of his Counsel thereof, such as ye hold
for certain will say it to the King. Te shall not
Respite the Kings Debts for any Gifts or Fa-
vour, where you may raise them without great
grievance of the Debtors. Te shall truly and
righteously treat the People of your Sheriff-
wick, and do right as well to Poor as to Rich,
in all that belongeth to your Office. Te shall do
no wrong to any Man for any Gift or Behest,
or Promise of Goods for favour, nor hate. Te
shall disturb no Mans Right. Te shall truly ac-
quit at the Exchequer, all those of whom ye shall
any thing receive of the Kings Debts. Te shall
nothing take whereby the King may lose, or
whereby that Right may be disturbed, letted,
or the Kings Debt delayed. Te shall truly
return, and truly serve all the Kings Writs,
as far forth as shall be within your cunning.
Te shall not have to be your Under Sheriff, or
any of the Sheriffs Clerks, of the last year past.
Te shall take no Bayliff into your Service, but
such as ye shall answer for. Te shall make each
of your Bayliffs to make such Oath, as ye make
your self in that, that belongeth to their Occu-
pation. Te shall receive no Writ by any of you
or

or yours unsealed, or any sealed under any Seal of any Justice save of Justice in Eyre, or Justice assigned in the same Shire where ye be Sheriff in, or other Justice having Power, or Authority to make any Writs unto you by the Law of the Land, or any Justice of Newgate. Te shall make your Bayliffs of the true and sufficient Men in the County. Te shall be dwelling in your proper person within your Baliffwick, for the time ye shall be in the same Office, except ye be otherwise Licensed of the King. Te shall not Let your Sheriffwick, nor any Bayliffwick thereof to Farm to any Man. Te shall truly set and return reasonable and due Issues of them that be within your Bayliffwick after their Estate and their Honour; and make your Pannells your self of such persons, as be most next, most sufficient, and not suspected or procured, as it is ordained by the Statutes, and over this in eschewing and restrainer of the Mans-slaughters, Roberies, and other manifold grievous Offences, that have been done dayly, namely of such as name themselves Soldiers, and by other Vagrants, the which continually increase in number, and multiply, so that the Kings true Subjects may not be safe; yea, Ride, nor go to do such things as they have to do, to their intolerable hurt and hindrance: Te shall truly and effectually, with all diligence possible to your Power execute the Statutes, as the Statutes of Winchester, and of Vagabonds. These things all ye shall truly keep, as God ye help.

Note,

Note, That there was an Addition in this Oath by the Statute of 5 R. 2. and 2 H. 4. c. 15. Crok. Car. p. 23. 25. Sir Ed. Coke's Case. (viz.) That he should seek to repress all Errors and Heresies commonly called Lollards, and should be assistant to the Commissaries, and Ordinaries in Church matters. And this was objected by Sir Ed. Coke, after he had been Lord Chief Justice of both Benches, and made Sheriff of the County of Buckingham, when he had a *dedimus potestatem* annexed to a Schedule, in the first year of Charles the first: And ever since they have been left out, because *Lollardism* then was the true Antipapal Religion as is now professed. And he made other Objections, one whereof was, that some parts of the Oath are not by any Statute, and its a Maxim, *That none but the Parliament can appoint an Oath.* But it was resolved by the Judges, that this Oath being appointed, and continued divers years by direction of the Statute, altho' without the express Authority of any Statute Law; yet may well be continued for the publick benefit. None but the Parliament can appoint an Oath.

Note, As to the Statute of *Winchester*, the Justices of Peace have eased the Sheriff of much trouble. And by the Statute of 39 Eliz. cap. 4. all former Statutes for the punishment of Vagabonds are Repealed

The Oath of the Sheriff of Oxford and Berks, and also of Cambridge and Huntington.

YOU shall Swear, That well and truly ye shall Serve the King in the Office of Sheriff of Oxford and Berks. And the Kings Profit, &c. ut supra usque So help ye God. And also ye shall Swear, That the Masters and Scholars of the University of Oxford, and
C their

their Servants from injuries and violences Te shall keep and defend by all your Strength and Power; and the Peace in the said Univesity as much as in you is, ye shall keep. And that you shall give your Councel and Help to the Chancellor, and Scholars of the same Univerfity, for to punish the disturbers and breakers of the Peace there, after the Priviledges and Statutes of the said Univerfity, at all times when it shall be needful. And also, ye shall put your help withal your Strength to defend the Priviledges, Liberties and Customs of the said Univerfity. And that ye shall receive all such Oaths of your Under-Sheriffs, and other your said Ministers of your said County of Oxford, as soon and anon as ye shall be at the the Castle, or at the Town of Oxford, in presence of any that shall be thereto deputed by the said Univerfity; to the which things the King will, that your said Ministers be by you acted and compelled. As God you help.

The like Addition to the Oath of the Sheriff of Cambridge and Huntington, *mutatis mutandis*.

If the New Sheriff be not in London, he may take his Oath by *dedimus potestatem*, directed to any two Justices of Peace of the same County, one to be of the *Quorum*, or to any other Commissioners.

The Cities and Towns in *England*, which have Sheriffs are as follow.

The City of	[	Bristol	— — — — —	2
	[	Coventry	— — — — —	2
	[	Canterbury	— — — — —	1
	[	York	— — — — —	2
	[	Exon	— — — — —	2
	[	Glocester	— — — — —	2
	[	Leichfeild	— — — — —	1
	[	Lincoln	— — — — —	2
	[	London	— — — — —	2
	[	Norwich	— — — — —	2
	[	Worcester	— — — — —	1

The Town of	[	Kingston upon Hull	— — — — —	1
	[	Southampton	— — — — —	1
	[	Nottingham	— — — — —	2
	[	Poole	— — — — —	1
	[	Newcastle on Tyne	— — — — —	1

The Return of the *Dedimus* by the Commissioners is thus.

Virtute istius Brevis nobis direct' (tali die & Anno) recepimus Sacrament' infranominat' A.B. Vicecom' Warr' tam de offic' Vicecom' in dict' Com' Warr' bene & fidelit' faciend' juxta formam cujusdam Scedulæ presentibus ann' quam Sacramentum specificat' in Actu Parliament' Anno Regni Domine Elizabethæ nuper Regine Angliæ &c. primo fact' secundum tenorem Brevis & Scedulæ Brevis præd' similis annex' prout Breve istud in se exigit & requirit.

The Sheriff must take the Oath and Sacrament, as is now usual for all Officers and Ministers of Justice. Stat. Car. 2. and the Oaths appointed by the Statute of William and Mary.

The Office and Duty of Sheriffs &c.

In the general Case of the Sheriffs of *England*, when the King makes a new Patent, tho' the Ancient Sheriff had his Office but *durante beneplacito*, presently a Writ of *de Comitatu Commisso* (which is commonly called a Writ of Discharge, or a Writ *de exoneracione officij*;) shall issue; the form *Vide supra*.

And then another Writ is directed to the Ancient Sheriff for the delivery of his County and Rolls, Writs, &c. to the New Sheriff. These were two Writs formerly, but now they are included in one. *Vide supra*.

The next thing is, the New Sheriff at or before his first County Court, must take over from his Predecessor all his Prisoners and Writs precisely by view, and by Indenture to be made between them, wherein all the Causes which he has against every Prisoner, must be set forth and delivered, or else the New Sheriff is not charged with them, as in *Westbies Case*.

Now before I say more as to the Delivery, I I shall shew you what Actions of the Old Sheriff, or his Officers shall be good, and to what time.

Now the Old Sheriff of a County is Sheriff, until the New be Sworn, altho' he be Chosen; for it is the taking of his Oath that doth compleat him in his Office. And the Arrest is good by the Old Sheriff, till a new Patent be shewed to him, or other sufficient notice, *Cro. El. Fitzs Case*. The Acts of the Old Sheriff are good, till a Writ of Discharge received, *More 186*. And a Bayliff Errant may Execute a Warrant of an Old Sheriff made before a Writ of Discharge; altho' a New Sheriff be Chosen, *More 364*.

And therefore in *Cro. El. 440*. Action on the Case was brought against the Sheriff, and the Plaintiff declared, whereas he had recovered an 100*l*. and had a *Fieri facias*, and Defendant by

verdue

Till what
time the
old Sheriff,
or the new
Sheriff may
Act.
Crok El. 12
Fitzs Case.
More 186.
More 364.
Ss. John's
Case.
Cro. El.
440.
Boucher
and W's.
man.

vertue thereof levied 28 l. and had not Return-
ed the Writ, nor paid the Money to the Plain-
tiff. On Not guilty pleaded, in Evidence it was
proved, that the Writ was delivered to C. the
Defendants Under-Sheriff, 9 No. 34. El. and the
same day he made Execution; and he proved,
that the same day a Writ of Discharge was deli-
vered to him, 6 No. 35. El. but he did not prove he
had notice of this Writ of Discharge, before the
Execution served, *Per Cur.* he was yet Sheriff,
and Chargable to the Plaintiffs Action. The
Ancient Sheriffs ought to give notice of all Ex-
ecutions, against any in their Custody to the
New Sheriff, altho' the Executions are of Re-
cord; or otherwise, the New Sheriff shall not
be chargable with them. But if the Old Sheriff
dye, the New Sheriff at his Peril, shall take
notice of all Executions, which are against any
that he finds in the Gaol; and this is of neces-
sity, for there is none to deliver over the Pri-
soners to him: And in such case the New She-
riff is to take notice of all the Writs. *Dals.* 17.
Moore 688. *Pop.* 85. *Mesme Case.*

Notice of
Executions
to the new
Sheriff.
3 Rep.
Westbies
Case.

The Delivery over of the Prisoners must be
by Indenture, and every several Execution must
be mentioned that is against any one. And there-
fore in the great Case to this purpose, *viz. Westbies*
Case, The Sheriff of London by Indenture Deli-
ver over J. S. (who was in Execution at the
Suit of A. and B. severally,) and only mentions
the Execution against A. and J. S. Escapes, B.
brought Debt against the Old Sheriffs, and ad-
judged that the Action well lies; for he cannot
be in Custody of the New Sheriff for this Exe-
cution, because they were not charged with
this Execution, and the fault was in the Old
Sheriffs, in omitting it on their Indenture; and the
Escape commenceth *eo Instanti* that the Ancien-

Delivery
of Prisoners
3 Rep.
Westbies
Case.

The Office and Duty of Sheriffs, &c.

Sheriffs deliver their Prisoner to the New, for then they cease to have the Custody of him, and tho' he remains in the Walls of the Gates, 'tis an Escape in Law.

And until the Prisoners are delivered to the New Sheriff, they remain in the Custody of the Ancient Sheriff, notwithstanding the New Patent, the Writ of Discharge, and the Writ of Delivery.

As to the Prisoners in Execution, in case of the death of the Sheriff. *Vid. infra tit. Execution.*

What is to be done in case of the Kings death.
Dalt. 17.

Now by the Death of the King the Sheriffs Office ceaseth, and therefore in the next King's time, a new Patent is immediately sued out; and if a Prisoner escape between the Death of the King and the new Patent, the Sheriff shall be charged, for he ought to have made his Gaol safe. *Vide supra, Westbies Case.*

What shall be said a good delivery, and how to be made.

2 Leon 54.
Smallman and Lane.

In *Smallman and Lanes Case*, It was the Opinion of all the Justices, That by the Law the Old Sheriff ought to deliver the Body of him, who is in his Custody, by view to the new Sheriff, and such Prisoners ought to be brought to him to view; and from that time, the Law shall judge the Prisoners in the Possession of the new Sheriff, and not before.

D. Sheriff of *Warwick* had one in Execution whom he kept in a private Prison by himself, for all his Executions in the Town of *Warwick*; and when he was discharged of his Office, and a New Sheriff made, D. said to the New Sheriff, that he had such an one in Execution in his Custody, and offered to the said Sheriff to put him in the Indenture amongst his other Prisoners delivered to the New Sheriff; but the new

The New Sheriff not bound to

receive Prisoners from the Old Sheriff, but at the Gaol; yet if the other will receive them out of the Gaol, the old one is discharged. *Dabridgecourts Case*, largely cited in *Westbies Case*, *Pop. 85.*

Sheriff

Sheriff refused to receive him, unless *D.* would deliver him into the Common Gaol of the County, which was in the Town of *Warwick*, and then the Prisoner escaped. *D.* was charged with this Escape, for the New Sheriff is not compellable to take the Prisoners of the delivery of the Old Sheriff, but in the Common Gaol of the County. And if the Sheriff dies, the Party shall be rather at a prejudice, than the New Sheriff without cause charged with him: And in such a Case, the Party who sued Execution may help himself, (to wit) by a remanding of the Body, by a *Corpus cum causa*, whereby he may be brought to be duly in Execution, and this under a due Officer.

There was an *Habeas Corpus ad recipiend'*, &c. How Prisoners shall be turned over by Indenture. for *W. W.* to *H.* Sheriff of *Glouc'* and he moved the Court for their Advice, because *W.* was in Execution when *B.* was Sheriff, and was left in the Gaol when *C.* was Sheriff; but he was not turned over by Indenture to *C.* nor to *H.* but was yet in the Gaol, and had been charged with a new Execution, which they were ready to Return, but pray that he shall not be inforced to Return the other Execution; because he was not in Custody to him for this. *Per Cur'*, He shall not be compelled to make other Return, but that for the first Execution, he shall yet remain in the Custody of *B.* the ancient Sheriff, tho' his Body be in the Custody of the New, because he was not turned over by Indenture; and the difference between this and *Westby's* Case is, that there the Prisoner was turned over for one Debt, and not for the other, and therefore an Escape for that. And *per Cur'*, *B.* the ancient Sheriff may turn him over by Indenture to *H.* the present Sheriff (for it ought not to be to *C.* for he never was in his Custody) and then he will make Return of all

If a Prisoner is not turned over to the next Sheriff, and yet remains in the Gaol, he is Prisoner of the ancient Sheriff, and may be turned over.

The Old
Sheriff
may make
Indenture
to one who
is Sheriff
several
years after.

the Executions, *Siderfin* p. 335. *Hammer and Wicomer. Vide 2 Keb. 224.*

Note, It was said by *Hobart*, *Winch* 51. in *Empson and Batburst's Case*. If the Sheriff make an Extent, and before a Liberate a new Sheriff is chosen, in this case the new Sheriff shall have the Fees appointed by the Statute.

Upon Delivery of the old Sheriff to the new Sheriff, and Escape thereupon, *Vide tit. Declaration in Escape.*

The Form of an Indenture for setting over Prisoners and Writs between the Old and New Sheriff.

This Indenture made, &c. Between A.B. Esq; late Sheriff of the County of Warr^o of the one part, and C.D. Knight, now Sheriff of the said County, of the other part, Witnesseth, That the said A.B. by virtue of his Majesties Writ of Discharge (of his late Office) to him directed, hath delivered and set over unto the said C.D. these Writs following, (That is to say) a Capias against W.H. Rex^o Oatab Hill. ad sect. Johannis Smith, &c. together with the Bodies of J.N. in Execution at the Suit of G. H. for a Debt of 22 l. and J. H. at the Suit of C. D. in Execution for 10 l. and R. G. in Execution as well at the Suit of O.D. for a Debt of 100 l. as also at the Suit of N.W. for a Debt of 40 l. in, &c. In witness, &c.

All the Writs which are set over in the Indenture between the Sheriffs, if they have been executed by the Old Sheriff, then they must be Returned by him, or in his Name, and Indorsed under by the New Sheriff thus:

Breve prout Indorsat^r mihi deliberat^r fuit per A.P.
Armig^r, Vic^r, - prox^r predecessor^r meum in exitu
ab Officio suo.

Per C.D. Mil^r, Vicecomp^r.
Wbat

What Acts may or must the Old Sheriff do after he is discharged, and what remedy against him for a Misdemeanor in his Office.

Process in some Cases may be to the Old Sheriff, to bring in the Body of a Prisoner; and that is, where before he hath made a Return of *Cepi corpus & parat' habeo*, and afterwards he is removed and a New Sheriff made; on Non-appearance of the Prisoner Process shall go to the Old Sheriff, as *Distingas*, 1 Bulstr. 82. Egerton and Morgan.

In what case Process shall be to the Old Sheriff.

In case of Return of *Cepi corpus*.

The difference is, if the Sheriff at the day Return *Cepi corpus* and have not the Body ready, he shall be amerced, and a *Distingas* shall be awarded to the Coroners. But if the old Sheriff at the day Return *Cepi corpus*, and before the day of the Return he is removed, and a new one is made, the *Distingas* here shall be awarded to the new Sheriff, if it appear on the Record that he has taken the Body.

A Sheriff on a *Fieri fac'* seized Goods in his hands to the value of the Debt, and payed part of the Debt, and the Goods not being sold nor the Writ Returned, the Sheriff was discharged, and afterwards sold the residue of the Goods without any *Vendition' exponas*. And per Cur', the sale is good; for the Writ of *Fieri fac'* gave Authority to him to sell without any other Writ, 2 Cro. 73. *Ayer and Aden*. Therefore Mo. 757. the same Case is Misreported, which saith, If the Sheriff takes Goods by *Fieri fac'* and then is discharged; he may not sell them, but ought to deliver them to the new Sheriff, and Return *quod non invenit emptores*. And Yelverton in the same Case agreed with Crook on *Fieri fac'*, *sed non invenit emptores*.

Sale of Goods after Discharge.

emptores, a *Distingas* to sell shall go to the old Sheriff, and not to deliver the Goods to the new one, *Mo. 757. Yelv. 44. Cro. Jac. 73. Aden and Ayre. 2 Keb. 821. Mildmay and Smith.*

Party pays
the Money
to the Old
Sheriff, he
shall not
pay it
again.

If Money be paid to the old Sheriff, and he is discharged before the Return of the Writ, the party shall not be compelled to pay it again; and the Plaintiff may have his remedy against the ancient Sheriff, if he will, *Cro. El. 209. Rook and Wilmott.*

The old Sheriff returned the Proclamation upon an *Exigent*, after that he was discharged of his Office; and by the Judgment of the Court the Outlawry was void, and the party was discharged, *Dyer 41.*

Regula.
Pleading.

Note this for a Rule, That that which comes after the *Nuper* is not traversable, unless the party be charged by reason of his Office, as if he be called in pleading *Nuper Vicecomes, nuper Escheator, &c.* *38 H. 6. 18.*

Sheriff, out
of his
Office, not
to be fined
for a Con-
tempt
during his
Office.

If Attachment may be granted against a Sheriff for Contempt, after he is removed out of his Office. The Justices said, they could not do it; for now he is no Officer and cannot now be fined, and without Fine they do not use to Imprison, *2 Brownl. 144.*

So *Stiles*: A Sheriff out of his Office cannot be fined by the Court; but a Tipstaff may be sent for, to bring him in to answer the Misdemeanor committed by him when he was in his Office, *Pract. Reg. 304. p. 18.* Or a *Distingas nuper Vicecomiti* may Issue out against him, *2 Sand. 88.*

The Form of Pleading, Removal of one Sheriff and the Election of another, *vide 2 Sand. 88.*

The new High-Sheriff at the first County-Court, next after his Election and the discharge of

of the old Sheriff, must read his Patent and Writ of Assistance, and nominate his Under-Sheriff, and depute and proclaim four Deputies to make Replevins in the Sheriffs name, who ought not to dwell above twelve miles distant one from the other, in every quarter of the County one, and to make deliverance of Distresses, when need shall require; *per Stat. 1 & 2 Ph. & Mar. c. 12.*

The Sheriffs Letters Patents, when and where to be read.

The new Sheriff, before he shall Return any Writs into the Chancery, Kings-Bench, Common Pleas or Exchequer, ought to make an Attorney or Deputy on Record in every of these Courts, there to receive all manner of Writs and Warrants as shall be directed to the Sheriffs respectively, and this upon pain of 40 l. and that *per Stat. 23 H. 6. c. 10.* And such Deputies are to be made by Warrant of Attorney from the High-sheriff. The like Law is of Sheriffs of Wales, and Lancaster, and Chester, and all Writs of Proclamation shall be delivered to every such Deputy. The Bishop of Durham, and (during the Vacancy) the Chancellor of Durham, shall likewise have a Deputy to receive all Writs of Proclamation.

His Deputies.

Vid. plus of Deputies infra.

How the Sheriffs Office may be determined, or not, before the year be out.

The King may determine his Office when he pleaseth, tho' he cannot (during the Continuance of his Office) abridge his Power.

The Office of Sheriff determines by the death of the King, *vid. supra.*

2 Siderfin, p. 49.
Cro. El. 12.
Lord Mortons Case.

The Sheriff being made a Baron of Parliament, or becoming a Baron by descent, this doth not determine his Office.

By

By the Death or Resignation of the King, the Authority of the Sheriffs, and all his Officers, doth determine; therefore it is used presently, in the next Kings time, to sue out new Patents of his Office, and of Assistance:

CH A P. III.

Of Under-sheriffs, &c. His Nature and Office, and Oath. In what cases the High-sheriff must execute the Office in person: He cannot abridge the Under-sheriffs Power. Of the Sheriffs Deputies in the County, and in the Courts above. Pleadings by the Deputies, and of Rescues from him. What Bonds and Covenants between the High-sheriff and Under-sheriff are good or not, and the pleadings to such Bonds. What acts or defaults of the Under-sheriff, Bayliffs, Gaolers, the High-sheriff shall be answerable for, or not: And what Actions shall be brought against the High-sheriff, Under-sheriffs and Gaolers. Cases and Resolutions about the Rule Respondeat Superior. Where the Lords of a Franchife shall be answerable. Of Trial by the Sheriffs Certificate or by the Record.

WE have seen before how that an Earl had the Jurisdiction of the Counties, and their Commission ran thus, *Commissimus vobis custodiam Comitatus nostri ad voluntatem*, and the Sheriff comes in his place; and all Sheriffs likewise have their Commissions *ad voluntatem nostram*; and tho' there is no mention in his Patent of any Deputy to be made by him, yet he makes one. And as in the first Government the Earl made his Deputy, so the Sheriff made his Deputy, (*viz.*) the Under-sheriffs and Bayliffs Errants within the County, called

Deputy.
3 Bulstr.
77.78.
Phelps and
Winch-
comb.

Chap. 3. Under-sheriff. Deputy. Oath.

29

called the *Serjeants* of the County, and there is no Warrant for him to do so; but yet the same hath been still done.

A Ministerial Officer, as the Sheriff is, may make a Deputy; but a Judicial Officer cannot, because he is to do Justice. *Sed distinguendum est.* All Returns made by him, ought to be made in the name of the Principal Officer. For the High-sheriff only is sworn as to the execution of the Office of Sheriff, and he is to answer all.

Ministerial
Officers
may make
Deputies.

Sub-Vicecomes is a person that our Law takes notice of, and an Under-sheriff hath been in use before the Conquest.

The Anti-
quity of
Under-
sheriff.
The Na-
ture of an
Under-
sheriff.

Now an Under-sheriff being in effect but the Sheriffs Deputy, according to the nature of a Deputation, he is removable as an Attorney is; and if the Sheriff make him irrevokable, yet he may revoke him. He is but in the nature of a general Bayliff Errant to the Sheriff, and the whole Shire, as others are over the Hundred. So that the High-sheriff may grant this Office at Will; or he need not make an Under-sheriff at all, but may exercise it himself.

The High-
sheriff may
execute the
Office of
Under-
sheriff
himself.

The Under-sheriffs Oath.

Every Under-sheriff, before he meddles with his Office, shall before one of the *Justices of Assize*, or the *Custos Rotulorum* of the County, or two *Justices of the Peace* there, one whereof to be of the *Quorum*, take the Oath of Supremacy, and also the Oath hereafter written, on pain to forfeit treble Damages to the party grieved, if he commit any act contrary to the said Oaths, or either of them. The Form of the Oath is as follows:

Stat. 27 Ed.
c. 12.

I A. B. shall not use nor exercise the Office of Under-Sheriff corruptly, during the time that I shall remain therein; neither shall or will accept, receive or take, by any colour, means or device whatsoever, or consent to the taking of any manner of Fee or Reward of any person or persons for the Impannelling or Returning of any Inquest, Jury, or Tales, in any Court of Record for the King, or betwixt party and party above Two shillings, or the value thereof, or such Fees as are allowed and appointed for the same by the Laws and Statutes of this Realm: But will, according to my Power, truly and indifferently, with convenient speed, Impannel all Jurors, and Return all such Writ or Writs touching the same, as shall appertain to be done by my Duty or Office, during the time that I shall remain in the same Office.

So help me God.

Bayliffs of
Franchises,
and Sheriffs
Deputies
to take
the same
Oath.

No Bayliff of Franchise, Deputy, or Clerk of a Sheriff or Under-sheriff, shall intermeddle with their several Offices, before they have taken the said Oaths, as aforesaid, (before the Persons appointed by this Act to administer the same) or before the Head Officer of the place, if it be a Town Corporate, altering only the Terms of the Office, and the Office of Under-sheriff, to such words as are convenient for the Deputation, Office, or Place respectively: And this on pain to forfeit 40 l. between the King and the Prosecutor.

The

The Forfeitures may be sued by Debt, Bill, Forfeitures, how to be recovered. Plaintiff or Information, in any the Kings Courts of Record: And Justices of Assize and of the Peace in their open Sessions, shall hear and determine the default done contrary to this Act, and on Conviction to award Execution by *Fieri fac'*, *Attachm'*, *Capias*, or *Exigent*.

The Sheriff in making an *Under-sheriff*, doth implicitly give him power to execute all the ordinary Offices of the Sheriff himself, that be transferred by Law; as serving Proceſs, Execution, and the like.

But in some Cases the High-sheriff must exercise the Office himself in person, and the Under-sheriff may not do it. As,

On a Writ of *Partition*.

On a Writ of *Redisseisin*; for in that the Sheriff is Judge. In what cases the High-sheriff must execute the Office in person.

In a Writ of *Waste*; for there the Sheriff is commanded to go to the place wasted. *Vide infra*.

In *Justices*, the Sheriff himself is Judge, or else all is *coram non Judge*, and the Under-sheriff cannot hold Plea in it.

In all Cases where the words of the Writ are, That the Sheriff shall go in his own person; as in an *Accedas ad Curiam*, *Waste*, *Redisseisin*; there the Under-sheriff cannot do it. And one may be Judge and Officer *in diversis respectibus*. As the Sheriffs in *Redisseisin*, *Waste*, &c. so Bayliffs in many ancient Corporations are Judges and Officers too, and the Custom is good, *Exo. Car. 138. Crane's Case.* One person may be Judge and Officer in diversis respectibus.

A Writ of *Partition* was awarded, and upon the Examination of the *Under-sheriff*, he confessed the *Highb-sheriff* was not there, as he ought to have been, and a new Writ was awarded.

Now

The Office and Duty of Sheriffs, &c.

Now in the Writs aforesaid, where the Sheriff must do Execution in his own person, if He be not there in person; if Exception be taken at the Bar before the Return of them be received, the Writ shall not be received: But if the Sheriff in such Writs Returneth, *That he was there in proper person*, and this Return be received, and the Writ filed, then the Court cannot Examine it; for the Return is good, and the party can have no Averment against the Return nor can have any Error. *Cro. El. Clay's Case, Hob. p. 13.*

If the Writ be returned and filed, the Court cannot Examine, whether he were there in proper person. But Exception may be taken at the Bar, before the Return be received.

High-sheriff abridge the Under-sheriffs Power. *Hob. p. 13. Norton and Sims.*

Cro. El. 440 Boucher and Wiseman.

But all the ordinary Offices of the Sheriff are transferr'd to the Under-sheriff: And therefore if a Sheriff will make an Under-sheriff, provided that he shall not serve Executions above 20 l. without his special Warrant, this Proviso is void. For tho' the High-sheriff may chuse, not to make an Under-sheriff at all, or may make him at Will, and so remove him wholly; yet he cannot leave him an Under-sheriff and yet abridge his Power, no more than the King can in the case of the Sheriff himself. Nor can the Under-sheriff restrain himself by Covenant; as he being Under-sheriff, is liable to execute all Process, and he hath power to do all that the Sheriff can Transfer. And so was the Case of *Boucher and Wiseman*. In the Indenture between the High-sheriff and Under-sheriff was an Exception, *That the Under-sheriff shall not intermeddle with the Execution of any Writ above the Sum of 40 l.* And per Cur' this Exception was repugnant and void.

Sheriffs

Sheriff's Deputy.

The *Under-sheriff* ought always to have a *Deputy* attendant in every of the Courts of *Westminster-Hall*, to receive and execute their Commands, and to give account of *Businesses* which may fall out about the Sheriff. *Vide supra.*

In case the Plaintiff declares, he sued *J. S.* on Pleading a *Latitat* directed to the Sheriff of *D.* and *J. S.* by Deputy was arrested; and the Defendant pretending to be Deputy to the Sheriff, took Bond of him and let him at large. The Defendant pleads, the Sheriff made him his *Deputy*, to bail all Prisoners bailable in the County, and thereupon he took Bond of *J. S.* and delivered it to the Sheriff, &c. his Deputation without Deed. The Plaintiff demurs, because he pleads his Deputation without Deed; *per Gawdy*, it is good without Deed; for a *Deputy* doth things only as a Servant, and in right of his Master, and so may be without Deed, *Cro. El. Clecock and Dennis.*

In Rescue the Bayliff of a Liberty arrested the party, and delivered him to the Sheriff's Deputy, and saith, not from the Sheriff; yet it is good: For in an *Action on the Case* he shall shew the Truth, as it is in *rei veritate*. *Cro. Jac. 242. Kent and Ellicot.* Rescue from the Sheriff's Deputy.

The Deputy shall plead the General Issue, as the Officer himself, by the *Stat. 7 Jac. Mo. p. 894 n. 1141.*

What Bonds and Covenants between the High-sheriff and Under-sheriff are good.

Covenant by the Under-sheriff, That he will execute any *Extent*, *Liberate*, *Elegit*, or other Execution not above the Sum of 40 *l.* is void. *Vide supra.* *Hob. p. 13.*

D

Covenants

Where
some Co-
venants
are good,
and where
not.

Bond for
discharge
of all E-
scapes.

Pleading.

Escape, tho'
after the
year, a
breach of
Covenant.

Covenants between the High-sheriff, some are good and some are void; for those that are good, the Bond for performance of Covenants shall stand good. *Aliter* upon a Statute, as 23 H.6. c.10. If the Sheriff will take a Bond for a Point against that Law, and also for a due Debt, the whole Bond is void, *Hob. p.13. Norton and Sims, 14 H.8. c.5.*

A Bond made by the Under-sheriff to the Sheriff, for discharge of all Escapes, is good: For since he transfers his Authority to him, its reasonable he should take Security of him to perform, 1 *Brownl. 83.*

Under-sheriff brought Debt against one of his Bayliffs on Bond to save harmless in executing Process, &c. and assigns the Breach, That the Bayliff had not executed such his Warrant sent to him, upon a Process directed to him out of the *Exchequer*, to levy Issues upon certain Lands. Defendant demurs, (1) because the Warrant directed to him was made out of the County: (2) Its not alledged, that the Mannor of *A.* where he was by the Warrant to levy the Issues is within the Hundred where the Bayliff had Jurisdiction; *per Cur.*, its a good Exception, and the Breach is not shewed to be within the Condition of the Obligation; because a Bayliff cannot execute a Precept out of the Hundred where he is Bayliff, *Stiles p.18. Slaughter and Day.*

High-sheriff brought Action of Covenant against the Under-sheriff, and alledged, he was a Sheriff *An. 1658.* and that one *W.* was then taken, and suffered to Escape out of his Custody; whereupon *J. S.* recovered against him, and therein it was alledged, That the Plaintiff 12 *Car. 2.* suffered him to Escape out of his Custody; its well enough: And any Escape, tho' after the year, would be a breach of Covenant, 2 *Keb. 352. Gremer and Humberston,*

Chap. 3. Bonds between High-sheriff &c.

35

If any Sheriff take Hire, Gift or Bribe of any Under-sheriff, Bayliff, Keeper of the Gaol, &c. for his Place or Office, he may be indicted, fined or imprisoned, *Art. super Chart. c. 13. 2 Inst. 566.*

Sheriff taking Bribes, or buying the Place of Under-sheriff &c.

In Debt on an Obligation to perform Covenants, on Oyer it appeared that the Plaintiff was Under-sheriff by purchase, and so void, *per 5 Ed. 6. c.*

Vide plus infra, sub hic Titulo.

What acts of the Under-sheriff, Bayliffs, Gaoler, &c. the High-sheriff shall be answerable for, or not; or what Actions shall be brought against the Under-sheriff or High-sheriff.

Upon every default in the Execution of his Office, be it by Neglect or Fraud of the Under-sheriff, he shall answer and be amerced in the *Exchequer*; but the Sheriff shall not be imprisoned for the act of the Under-sheriff, nor be Indicted.

Neglect or Fraud. *Litch. 187 Laycock's Case.*

Per Stat. 14 Ed. 3. c. 10. the Sheriffs shall have the Custody of the Gaols of the Counties, and shall put in such Gaolers as they will answer for. The Sheriff is an immediate Officer to the Courts of the King, and shall answer for Escapes; and shall be subject to Amerciaments, if he has not the Body ready in Court.

14 Ed. 3. c. 10. 4 Rep. 14. Milton's Case.

Sir Richard Dyer's Case, Sheriff of Huntington, and his Under-sheriff, in *Marsh and Astry's Case*. The Under-sheriff suffered one to Escape, and the Action was brought against the Under-sheriff: As if the Clerk in an Office Misenter any thing, he himself shall be punished for it, and not the Master of the Office; because he takes a Fee for it. But if a Return made by the Bayliff be insufficient, then the Sheriff himself shall be amerced, *1 Leon. p. 146. Marsh and Astry.*

Escape brought against the Under-sheriff.

Sheriff to answer for insufficient Returns.

The Office and Duty of Sheriffs &c.

Actions
against
the Under-
sheriff.

An Action of *Faux Imprisonment*, or other Action may be brought against the Under-sheriff in the Exchequer, altho' the High-sheriff be Officer of the Court; for the Court takes notice of the Under-sheriff also.

*Faux Im-
prisonment.*

Faux Imprisonment against the Under-sheriff; for detaining a Prisoner after a Release made, 1 Roll. Abr. 539. *Doyley and Jolliff*, 3 Bulstr. 96, 97. *Withers and Henly*.

Not Re-
turning a
Writ of
Summons.

If the Demandant in a Writ of *Entry* or *Disseisin* deliver a Writ of *Summons* to the Under-sheriff of the County, and after he summons a Tenant upon the Land accordingly, and notwithstanding doth not Return the Writ, Action on the Case may be brought against the Under-sheriff, if the Plaintiff will: For peradventure the Sheriff had not Notice of it, and the Under-sheriff took Fees to execute the Writ; and its said *falsè & malitiosè* for delay of the Plaintiff, which is imbezelling it, *Hill. 32 El. B.R. Marsh and Asty*.

Where the
Bayliff of
a Franchise
is charg-
able.

Servant of the Bayliff of a Franchise, sworn on Deputation to serve Process but of such a sum, and he serves Process of a greater sum *sans* Warrant, and after levied the Money, and parts with it; the Bayliff shall be chargable, *Hesley p. 12.*

*Sir Tho.
Jones Rep.
p. 215. Ol-
liet and
Bissey.*

Latitat issues to the Sheriff of N. who makes his Warrant to the Bayliff of a Liberty to arrest J. S. the Bayliff makes his Warrant to his Deputies: The Deputies Arrest him at *VP.* out of the Liberty, and after bring him into the Liberty, and delivered by them to the Gaoler of the Liberty. *Per Cur'*, The Action of *Faux Imprisonment* lies not against the Gaoler, for he had done but what belonged to his Office, and is not bound to enquire whether the first Arrest be Tortious, or not; and if he had been informed of it, yet if

if he had not been privy to the Practice, yet he ought to detain the Prisoner, being delivered to him by a good Warrant: For if such Information had been False, the Gaoler had been liable to an Escape; and the Prisoner is not without his Remedy, for he had a good Action against the Tortfeasors; and it seem'd to *Maynard*, the Action lyes against the Gaoler, because he is as a Servant to the Bayliff of the Liberty. But no such thing appeared in the Record; and in truth he was a Patent Officer by Grant of the Lord of the Liberty. But *per Cur*, if it had been so, this alters not the Case; for the Bayliff had made his Warrant lawful, and the sole Offence was in the Bayliffs, who execute the said Lawful Warrant illegally.

If the Under-sheriff make a Return amerciable, there the High-sheriff shall be amerced; for the Return is made expressly in his Name: But if it be a False Return whereupon an Action of False Return lies, in that case it may be brought against the Under-sheriff, *Dr. & Stud. c. 42.*

The Sheriff shall answer for the Misdemeanors of his Bayliff. *Ibid.*

If a Warrant on a *Fieri fac* be directed to an Under-bayliff of a Liberty, and he levies the Debt, but conceals the Writ, nor makes any Certificate of it, Action on the Case lies against him; for it is a Personal wrong, *Mich. 12 Jac. B.R. Bell and Catesby.*

Fieri fac is to levy the Goods of *Dawson*, and the Bayliff by virtue thereof took the Goods of *Luttrel* as the Goods of *Dawson*, Trespass well lies against the High-sheriff. For albeit had the Under-sheriff taken another Person, he had done wrong and without Warrant, and the Action well lies against him; yet as to Goods, this may be done by colour of the Warrant, and

Return amerciable.

Misdemeanors of Bayliffs. Concealment of a Writ.

The difference between the mistake of one person for another, and the Goods of one for another,

and the High-sheriff is chargable in Trespafs; and the Return of *Nulla bona* will not alter the case, having no influence on *Lusterels* Goods. By *Windbam*, the High-sheriff and Under-sheriff are one Officer: And if an Under-sheriff deliver *Hab' fac'* possession of *White-acre* on *Hab' fac'* possession of *Black-acre*, the High-sheriff is chargable, *aliter* of a Common Servant, who is a Trespasser, if he takes one mans Goods as anothers, for which I sent. Also, here is no Special Warrant set forth, therefore all is the act of the Sheriff; and the High sheriff may well bring his Action of *Covenant* against the Under-sheriff, *Pasch. 20 Car. 2. B.R. Cremer and Humberston.*

Action is
for Rescous
against the
Sheriff, not
against the
Bayliff.

If a Bayliff-Errant, or Special Bayliff, Arrest a man upon a *Capias ad satisfaciendum*, and after the Prisoner rescues himself, he at whose Suit he was arrested may not have an *Action on the Case* upon the Escape against the Bayliff, but he ought to have it against the Sheriff; for the Bayliff is but a Servant to the Sheriff, *Mich. 32 El. B.R. Atterton and Harwood.*

Gaoler to
to answer
for his
Servant.

Bayliff-
Errant.
Dr. & Stnd.
lib. 2. 127.

The Gaoler shall answer for his Servant, who permits Escapes.

The False Return of the Sheriff shall not make the Bayliff punishable in an Action; for he is Bayliff-Errant, and a meer Servant. As the Bayliff Justifies *per Sheriffs Warrant*; Plaintiff Replies, the Sheriff Returned upon the Writ, *Tardè, Cro. El. 181. Parks and Mosse.*

Respondeat Superior.

9 Reg 98.

In all Cases of Escape, the Gaoler who has the actual possession of the Gaol shall answer for all Escapes; but if he have not sufficient where-withal to answer *Respondeat Superior*, *i. e.* He that committed the Custody of the Gaol to him.

Yet

Yet *quære de hoc*. There is no Proceſs directed to a Gaoler, but an *Habeas Corpus*, and the Priſoners are in the Eye of the Law, in the Cuſtody of the Sheriff only; and when our Books ſay, *Actions of Escape* lye againſt Gaolers, ſuch abſolute Gaolers are intended, as Writs are directed to: Tho' I conceive an Action lies againſt the Sheriff or Gaoler at Election; and if the Gaoler is not ſufficient, then againſt the Sheriff. *Vid. Hardreſſ p.29. Wainright and Griſſib, a Caſe Argued, but not Reſolved.*

How the Superior, and in what Caſes, ſhall answer for the Inferior, or not.

If a man be ſent to Priſon on a *Statute Merchant* by the Mayor, before whom the Recognition was taken; and if the Gaoler will not receive him, he ſhall answer for the Debt, if he have wherewith; if he have not, then he ſhall answer that committed him to the Gaol, as appears by the *Statute* called *Statute Merchant*. *Dr. & Stud. lib. 2 p. 136*

23 H.6.c.10. The Superior ſhall put in ſuch for whom they will answer.

The *Comminality of London* that have the Fee, ſhall answer for the *Sheriffs*.

But in ſuch Action againſt the Superior it muſt be averred, that the Inferior was Inſufficient: As in Debt againſt the Dean and Chapter of *Pauls*, for the Escape of the Bayliſſ of a Liberty lies not, becauſe it is not averred that the Bayliſſ was inſufficient, 2 Roll. 155. *Dyer* 278.

Debt was brought on Escape of *Hok*, Committed to the Fleet on Judgment. Declaration is, That the Defendant, Sir *Jeremy Whitebeott*, was ſeiſed, and granted the Office of Ward n of the Fleet for three Lives to *Duckenfield*, who

The Office and Duty of Sheriff, &c.

was seised, and by *Habeas Corpus Holt* was removed, and by *Chancery* Committed to the *Fleet* in Execution; and *Duckenfield* suffered the Escape, the Defendant being Superior, and *Duckenfield* insufficient. The *Court* inclined, That the Superior in this case was chargable: But the Declaration being, That at the time of the Lease and Commitment of the Prisoner, and at the time of the Action, the Lessee *Duckenfield* was insufficient; and the Verdict is only, That he was at the time of the Lease, and of the Escape and Commitment; but not that he was Insufficient at the time of the Action, which is the Gift of the Action; and if he was Insufficient at the time of the Action, no Action lieth. And this is necessary to be found on *VWestm. 2. c. 11.*

Verdict not
pursuant.

25 Car. 2. and this being not found, nor *nec unquam postea*
Plummer the Escape, the conclusion being so *super totam*
& Whitch. *materiam*, and the *tota materia* is not found, &c.
et vid. Sir a *Venire fac' de novo* was awarded.
Tho. Jones

Rep. p. 60. The Duke of *Norfolk* was adjudged to answer
Mesme for his Deputy. *Dyer 278.*

Case. The Duke of *Norfolks Case* was this, He being
Dyer 278. Marshal of *England*, and having Authority to
Gawdies make a Deputy, made *Gawdy* his Deputy, who
Case. was sworn in open Court; afterwards *Gawdy* Licensed a Prisoner, who was in Execution to go into *Norfolk* with a Keeper, and Debt was brought against *Gawdy* for the Escape. It was adjudged, tho' he was but under Marshal, and the Action brought in *Middlesex*, supposing the Escape in *Shorditch*, and not in the County of *Surry* where the *Marshalsea* is, that the Action did well lie.

Noy 67. Debt was brought against the Dean and Chap-
Dean and ter of *Pauls*, for an Escape suffered by their Bai-
Chapter of liff of a Franchise, where they had Return of
Pauls Case. Writs. *Per Cur.* It lies not against them, but against

gainst the Bayliff, for the Writ is directed to him, *scilicet, Ballivo Libertatis*, and for an ill Return the Bayliff always is fined.

The County answers for the *Coroners*.

The Gaoler of the County shall not answer ^{Where the Rule Resp. Superior hold or not.} Escape on Execution, but the Sheriff, and some hold that *Respondeat Superior*, is only where the inferior Officer is removeable, as Gaoler to the Sheriff.

By *Wild* and others on *VV. 2. chap. 11.* It was never intended, that *Superior* should answer in any other Case than Account.

This as some say is grounded on 13 *Ed. 1. c. 11.* on 1 *R. 2. c. 12.* and *Respondeat Superior* was only in the Kings Case at Common Law. Marshal of the B. R. is but a Branch of the Earl Marshal.

If Execution be directed to a Sheriff to make ^{2 Brownl. Rep. 50.} Execution within a City, and the Sheriff directs his Warrant to the Bayliff, who does it, and after is a fugitive and not able to answer for it; the Lord of the Franchise shall answer for it, ^{Where Lord of a Franchise to answer.} and shall be liable to answer for his Bayliff.

He which has the keeping of the Gaol by right or wrong, shall be charged for the Escape of Prisoners. And if he which has the Custody of the Gaol in Fee, substitutes another under him at Will, or for Life, he which hath the ^{29 Rep. 98.} actual Possession of the Office shall be charged (by Action) for the Escape. But if they be not sufficient *Respondeat Superior*.

Having treated of Sheriffs and Under-Sheriffs, I shall add some few Resolutions, where Tryals shall be by the Sheriff or by the Record.

Of Tryals.

By Sheriffs
Certificate.
*Tryals per
pais. 9.*

Tryal may be by the Certificate of the Sheriff, upon a Writ directed to him in the Case of Priviledg, whether one be a Citizen or Foreigner.
Tryals per Pais. 9.

Cro. Car.
421.

Whether one was Sheriff such a day or nor, shall be tried *per Pais*.

By the
Sheriff.

If it be a Question, whether the Sheriff made such a Return or not, it shall be tried by the Sheriff, If whether the Under-sheriff made such a Return or not, it shall be tried by the Under-sheriff. If the Question be, whether such an one be Sheriff or not, he being made by Letters Patents of Record, shall be tried by the Record.

Cro. Car.
421.
By the Re-
cord.

As was *Smiths Case*. Error assigned, because the *Venire fac* was returned by Sir R. S. Sheriff of *Essex*, and in *Craftino Martini 9 Car.* and then the said Sir R. S. was not Sheriff, but H. S. the Defendant in the Writ of Error saith, that Sir R. S. was Sheriff of *Essex* before the Return of the said Writ, (*viz.*) 10 No. 9 Car. by the Kings Patent, *prout patet de Recordq.* Upon *Nul tiel Record* pleaded, at the day he produced the Letters Patents in Court, whereby he was made Sheriff. It was moved, that it ought to be tried *per Pais*, whether he were Sheriff such a day, and not by the Record of the Patent, for he might be discharged before the day. But *per Cur.* that shall not be intended, unless it were by pleading shewn to the Court, and so Judgment was affirmed.

Cro. Car.
421.
Smith Case.

8 H. 410,
20.
Br. Officer
33.

If it come in Issue, whether he that made the Array be Under-sheriff or not; this shall be tried by the County and not by the Officer.

C H A P. IV.

Of Bayliffs of Hundreds; their Nature, Office and Oath. Of Special Bayliffs, and of Promises on making Special Bayliffs, to save harmles from Escapes. Of Bayliffs of Franchises, their Nature, Power, Office; and of Returns by them. The manner of Pleading by Bayliffs of Franchises. In what Cases the Sheriff may Enter into their Liberties. Of Baliffs of Fees, or Guildable.

HAVING treated of Under-sheriffs, I come now to speak of Bayliffs to the Sheriff, (*viz.*) Bayliffs Errant, or *Ballivi Intinerantes*, or Bayliffs of Hundreds, and Special Bayliffs.

The making of the Bayliffs of Hundreds belongs to the Sheriff.

By the Statute of 14 *Edw. 3.* Hundreds (as to the Bayliffwicks of the same) are rejoyned to the Counties, and all Grants made of the Bayliffwicks of Hundreds since that Statute are void, ^{4 *Instit.* 267.} and the making the Bayliffs thereof belongs to the Sheriff; as in *Fortescues Case of Buckingham*

Shire, 2 *Car. 1.* *Fortescue* had of late divers Hundreds granted to him for Life, in *Com' Bucks*, reserving a Rent, which the Sheriff disallowed, and put in Bayliffs of his own; and *per Curiam*, ^{*Fortescues Case.*} this was against Law, and they belonged to the Sheriff. ^{*Hundreds cannot be granted from the Sheriff.*} And so,

A Patent to Execute all Process within an Hundred is void.

There was a Case in 34 *Car. 2. B. R. Cle and Ireland*, which confirms this resolution. The Sheriff of the County of *Leices^r* against the Grantee of the Hundred of *G.* in an Action on the Case, the Grant was by the King of an Hundred

Sir Th. Jones dred *pur Ans*, and on Special Verdict the Question was, If the Defendant had good Title by such Grant to the said Hundred to hold a Court, and constitute a Bayliff against the Will of the Sheriff, and the Contingent, and incident Fees of Leets, and Courts Barons of the Hundred. And *per Cur'* all the Hundreds which were not before the Statute of 2 Ed. 3. c. 12. and 18 Ed. 3. c. 9. in Fee by the Crown were joyned to the Office of the Sheriff. And Judgment was given for the Plaintiff against the Patentee.

Pract. Reg. A Sheriffs Bayliff is not an Officer of the Court, that the Court takes notice of.
49. 50.

The extent. A Bayliff of an Hundred may Execute a Writ out of the Hundred where he his Bayliff, for he is Bayliff all the County over.
Pract. 49.

Sheriffs, Bayliffs, not to be prejudiced by the Non-return, or the misreturn of the Sheriff. Sheriffs Bayliffs shall not be prejudiced by the Non-return, or Misreturn of the Sheriff. The Defendant (as Bayliff of an Hundred) took Goods in Execution on *Fieri fac'*, and sold them, and delivered the Money to the Sheriff; its good, and no Trover lies against the Bayliff, for they did Execute *Secundum Exigentiam Brevis*.
1 Leon. 144. *Parkes and Hows.*

To take the Oath of Allegiance. Sheriffs Bayliffs are to take the Oath of Allegiance according to the Statute, 27 Eliz. c. 12. *Subpæna* 40 l. (*viz.*) Bayliffs of Hundreds, for they should Execute all Writs, and must attend Assizes and Sessions; and the Statute requires, that they have sufficient within the Hundred, (but the ordinary Bayliffs or Bum-bayliffs need not.) And the words, (that no other Person or Persons shall intermeddle till Sworn) refer to the subject matter, (*viz.*) such persons as ought usually to swear as Sheriffs Officers.
3 Keb. 561, 552.
Le Roy ver. Jus Bents.

The Form of the Deputation of the Bayliff of the Hundred. *Vid. Greenwood* 53.

The Execution of all Writs, which come to the Sheriff, shall be done by the Bayliffs of Hundreds, such as are sworn, tho' now the use is to put in Special Bayliff. 9 Ed. 2. de vicecom.

Bayliffs of Hundreds shall attend Justices of Assize, Gaol-delivery, and Justices of Peace in every of their Courts and Sessions. 27 H. 3.

Of Special Bayliffs; what they are, and how they stand in the Eye of the Law.

A Special Bayliff to a Sheriff for the time being, he is his Officer, and his Arrest is the Arrest of the Sheriff; and if he suffer a Prisoner to Escape, an Action lies against the Sheriff; and if the Prisoner makes Rescous, the Return of the Rescous shall be, that it was done to the Sheriff himself. Jones Rep. 65. Bash and Salter. Return of Rescous.

The Statute of 27 El. c. 12. about taking the Oath that the Under-sheriff takes, extends not to Special Bayliffs. Jones Rep. 249.

Inconsideration, the Bayliff will make such an Promise to one his Special Bayliff, a promise to save harmless from Escapes is good; for he is an Officer appointed by the Plaintiff, and its no reason the Sheriff should be at a loss by his appointment. 178. 271. Dabridgecourt and Smalbroke. 1 Rel. Ab. 16. Palmer and Smalbroke. And this *Assumpsit* is not within the Statute of 23 H. 6. c. 10. for as the Party may Discharge a Prisoner in Execution, so he may foreclose himself from the benefit, if the Prisoner Escape and this Action lies, if he brings Escape against the Sheriff. Note, The Delivery of the Writ, and the Promise made, was to the Under-sheriff, and not to the Sheriff himself.

Of Bayliffs of Franchises, and their Power, and Returns.

Bayliffs of Franchises, or Liberties, are such as are appointed by Lords within their Liberties, to do such Offices within the Precincts of such Lordships or Liberties, as the Bayliff Errant do at large in their County, Hundred, that have *Retorna brevium* or Franchises.

The Oaths.
Insufficient
returns by
them.

Note, Bayliffs of Franchises, before they execute their Office must take two Oaths, one concerning the Supremacy, the other concerning the executing their Office. *Vide Supra. Tit. Under-sheriff.*

Where the
Sheriff may
enter the
Franchise
or not.

Fines and Amerciaments for insufficient Return of Writs, or other Process made by the Stewards, or Bayliffs of Liberties shall be set upon the Heads of such Stewards or Bayliffs, and not upon the Sheriff. *per Stat. 27 H. 8. c. 24.*

3 *Keb.* 71.
125.
Monday and
Frogat.
Bayliffs of
Franchises
cannot as
such, take
Bonds for
appearance
in the Sher-
iffs name.
must return
his Precept.

Hundred by Grant, that hath a Bayliff by particular Lord, is but his Servant, and the Sheriff usually makes another Bayliff to execute there: But a Bayliff of a Franchise Hundred, may wave his Franchise, and Arrest as a Sheriffs Bayliff; and then he may take Obligation in the name of the Sheriff, for properly a Bayliff of a Franchise cannot take a Bond for appearance in the Sheriffs name; but Bayliff of Hundreds may. *Dalt. 544. cont.*

* 2 *Keb.*

* The Baliff of a Liberty must Return his Precept and set his name to it; and a Bayliff *Itinerant* need not.

838.

Grene and
Jones.

† They cannot Arrest a Man without a Warrant to them by the Sheriff, and if they Return not the Warrant to the Sheriff, the Party Arrested may have his Action of false Imprisonment against the Bayliff.

† *Keb.* 86.
37.

A Bayliff of a Liberty cannot execute a *Cap. Utlag.* and if the Party be in the Hands of the Bayliff, the Sheriff may take him, for it is a *non omittas* in it self. *Cannot execute a Cap. Utlag. 3 Jac. 1. per Cur^a in B. R.*

In all Cases where the King is Party, the Process must be with a *non omittas propter aliquam Libertatem*, and there the Sheriff shall not send his Precept to the Bayliff of a Liberty, but shall enter himself *ex officio*, as for apprehending of Felons, or any act at the Suit of the King, always extant on Stat. Merchant, *vid. Stat. de Mercatoribus.* *Dalt. 456.*

But in other Cases where the King is no Party, there if without a *non omittas* the Sheriff shall enter a Franchise to execute the Kings Process, the Execution of the Process shall be good; but the Lord of the Liberty shall have an Action against him, and the Party Arrested shall have no remedy.

If Goods are Distrained and Impounded in a Liberty, the Bayliff is to make Replevin and Deliver them, but if the Bayliff will not, or did not Deliver them, after the Sheriff hath made Return of the Kings Writ to him, then the Sheriff shall enter and Deliver them. *per Stat. 52 H. 3. 21 Ed. 1. 17.* and in such cases the Sheriffs Return will not serve.

A Writ of Enquiry of Damages directed to the Sheriff, cannot be executed by a Bayliff of a Liberty, but by the Sheriff himself; so in *Redisseisin*, for he is both Judge and Officer there. *Hob. p. 83. Vizey and Gunstone.* *He cannot execute a Writ of Enquiry of Damages directed to the Sheriff. Bayliff of Westminster fined*

* One was in Prison in the Gatehouse, by a Warrant from Secretary Coventry for Misdemeanors, and the Gaoler refused to charge him with a *Warrant* *because the Gaoler of the Gatehouse, refused to charge a Prisoner with the Sheriff of Middlesex his Warrant. 3 Keb. 479. Briton and Grisfith.*

Warrant

Warrant of the Sheriff of *Middlesex* at the Plaintiff Suit. *Per Cur'* the Gaoler cannot dispute it, tho' the Court may give leave or refuse it; and the Bayliff of *Westminster* on pain of 20*l.* was ordered to Return the Writ.

Of Returns by them.

Of their Return of Writs to the Sheriff. *More 431. Palmer and Porter.* A Bayliff who Executes a Writ, and is removed before the Return, may make the Return to the Sheriff, and he over to the Court, but if he Executes it not, he shall not make the Return, but the Return of *Nihil* or *non est inventus* tis to be made by the New Bayliffs.

More 402. Atkinson. The Sheriff Returns, *Mandavi Ballivo qui mibi dedit responsum qd' cepit corpus, & A. fecit Rescous.* Its a good Return. But *Mandavi Ballivo qui cepit corpus, & A. fecit Rescous* is not good in *Redisseisin*, and that he cannot Return *Mandavi Ballivo, &c. Vide pluis tit.* Return.

Averment against the Return. *Dalt. 545.* A Man may aver against the false Returns of Bayliffs of Liberties, and shall recover as well against them, as against the Sheriff too of several Issues returned. *Dalt. 545.*

Force within a Liberty. *Dalt. 545.* Where the Precept is made to the Sheriff by the Justices of Peace, to return a Jury to enquire of a Forceable Entry, and the Force is within a Liberty, the Sheriff shall direct his Precept to the Bayliff of the Liberty to Return the Jury, the Bayliff must make a due Return as to Issues on Jurors, &c.

5 Rep. 92. Note, The Bayliff shall never take benefit of his Liberty. If *Capias* or *fieri fac'* comes against the Bayliff, the Sheriff shall execute the Process on him, or his Goods, within the Liberty; and where the Bayliff of the Liberty is party to the Suit, he shall not Return the Jury, but the Sheriff.

VVhere

Where and in what Cases the Sheriff may Enter into a Franchise.

Wheresoever the King is a Party, as in every Felony or suspicion of Felony, or otherwise in any Action, the Sheriff *ex officio* is to enter the Franchise, and to execute the Process himself. 5 Rep. 92.

In a Writ of Wast and Redisseisin, the Sheriff must enter the Franchise, to make enquiry, &c.

So where the Bayliff *nullum dedit responsum*.

So to Deliver a Distress.

But 'tis safest for the Sheriff in default of the Bayliff, to have a Writ of *non omittas propter Libertatem*.

On extent upon Stat. Merchant, the Sheriff is to enter the Franchise.

If the Sheriff enter on *non emittas*, by reason of the Bayliffs default, and Execute the Writ, the Sheriff shall warn the Bayliff of the Franchise, that he be before the Justices at the day contained in the Writ, and if he come not, and excuse himself, then all Writs judicial in the same Plea, shall be Writs *de non omittas*. Terms Ley.

The Sheriff in his Return is to set down the name of Baliff of the Liberty.

Pleadings by Bayliffs of Franchises.

Trespas for taking away a Mare; the Defendant saith, That before the Taking the Defendant (being the King's Bayliff) by Precept out of the Court of *Pomfret*, to make Execution, &c. on *Levari, &c.* *Per Cur'*, Its ill, because he doth not shew the Jurisdiction of the Court; and that is necessary by the Bayliff of an Inferiour

He must shew the Jurisdiction of the Court.

1 *Reb. 53.* ferious Court, especially because he Justifies by reason thereof, as in the *Countess of Rutlands Case*; and it must appear that the Court hath Cognizance of the Cause, *aliter* he cannot execute there Precept.

Plead,
Rescue
from the
Deputy of
the Bayliff
of a Li-
berty.

Action on Escape, and declares he delivered a Writ to the Sheriff of *Nottingham*, who made a Warrant to the Bayliff of the King's Liberty of *Newark* to execute it; which Warrant was delivered to one *L. Deputy* of the Lord *Burleigh*, *Ballivo Libertatis Dom' Regis Wapentagii sui de Newark*, who Arrests him, and the Defendant Rescued him out of the Custody of the said Deputy. He saith, he was Rescued from the Deputy of the Bayliff of the Franchise; and does not say, from the Bayliff himself, or the Sheriff. *Per Cur'*, its good: For in this *Action on the Case* he shall shew the Truth, as it is *rei veritate*, and its not like the Retorns of *Rescues* or *Indictments*, which say, it was done to the Sheriff or Bayliff himself. It was moved for Error, Secondly, because it is alledged, the Lord *Burleigh* was *Ballivo Libertatis Dom' Regis de Newark*, and the King cannot have any Liberties; for they are extinct when they are come to his hands. *Sed non allocatur*: For the King may have such Liberties by the suppression of Abbies, (which are not extinct, but revived *per Stat. 32 H.8.*) or by some other ways, and it shall not be intended to extinct unless it be shewed.

Bayliff of
a Liberty
may have
Deputy.

And the Bayliff of a Liberty may well have a Deputy, *Cro. Jac. 241. Kent and Ellis.*

Bayliffs

Power of Bayliff of Franchises and Pleadings.

The Bayliff of a Franchise cannot take a Bond for Appearance in the Sheriffs Name; but Bayliffs of Hundreds may. *Vid. 3 Keb. 552. Ellis's Case.*

Difference
between
Bayliffs
of a Fran-
chise and
Sheriffs
Bayliffs.

Hundreds that have *Retorn' Brevium* are Franchises.

Hundred by Grant, that hath Bayliff by particular Lord, is but his Servant, and the Sheriffs usually makes another Bayliff to execute there. But a Bayliff of an Hundred may waive his Franchise, and Arrest as Sheriffs Bayliff, and then he may take *Obligat'* in the Name of the Sheriff also, *3 Keb. 71. Munday and Frogate.*

The Bayliff of a Liberty must Retorn his Precept, and a Bayliff Itinerant needs not, *2 Keb. 838. Green and Jones.*

A Plaint being before the Bayliffs of *Bury*, they directed a Warrant to the Under-Bayliffs to take the party, *Ita quod habeant Corpus ejus eorum Ballivis ad prox' Cur' tenend'*, (*tal' die.*) The Under-Bayliffs arrested him, and committed him to Prison, *sub Custod' Def. S.T.* The Action on the Case lies not against the Defendant; for the Prisoner was not Committed to him by any Lawful Authority; it was *Ita qd'*, but not to Commit him: And the Action lies against them, if they have him not at the Day, *Cro. El. 743. Baldry and Johnson.*

If Execution be directed to a Sheriff, to make Execution within a Liberty, and the Sheriff directs his Warrant to the Bayliff, who does it, and after is a Fugitive and not able to answer for it, the Lord of the Franchise shall answer for it, and shall be liable to answer for his Bayliff, *2 Brownl. 50.*

Lord of
the Fran-
chise to
answer for
his Bayliff

The Office and Duty of Sheriffs. &c.

Dalt. 543.

There are other sorts of Bayliffs, which are Bayliffs of Fee, and are Officers of Fee within their Jurisdiction and Precinct. And for the Execution of Process there, the Sheriff shall not write or send his Precept to these Bayliffs, as to a Bayliff of a Franchise, but as to the Bayliff of Gildable; and the Sheriff shall return his Answer, and make his Return as if the Sheriff himself had served the Process; and the Return thereof shall be in the Name of the Sheriff, and shall not make mention of the Bayliff of Fee: But if such a Bayliff will not Execute the Process, a *Non omittas* shall go out to the Sheriff.

*Mirror of
Just. lib. 4.*

The *Mirror of Justices* saith thus: If the Bayliff of a Franchise does not make Execution of a Return of the Sheriff, the Sheriff may enter into the Franchise, and the King shall recover the Seisin, and so that shall become Guildable which before was Enfranchised.

C H A P.

C H A P. V.

Of the County Court. The Nature of it. Its Jurisdiction, as to the Sum it holds Plea of. Of the time and place. The Forms of the Original Process. Of Execution there. Of the County Clerk. Of Replevin. The Sheriff's Office, and demeanour therein, and the Retorns thereof, what are good, or not. Pone. Withernam. The manner of Replewying. The Retorno habendo. Second Deliverance. Property. Pledges in Replevin. The Form of the Entry of the Plaint. The Form of the Precept in Replevin. The Form of the Bond for Security. Of Accedas ad Curiam. Recordari fac' Loquelam. Of the Writ of Justicies. Of the Sheriff Tourn, Jurisdiction and Pleadings.

Of the County Court, &c.

THIS Court is no Court of Record, but only a Court Baron, and the Suitors are Judges. But in a *Redisseisin* the Sheriff is Judge, by the Statute of *Merton*, cap. 3. and a Writ of *Error* lieth of his Judgment.

The County-Court is incident to the Office Incident of Sheriff, and so is the Entry of all Proceedings to the Office of Sheriff. there; and therefore if the King grant the Office of Clerkship of the County Court to *M.* and constitute *J.S.* Sheriff of the same County, its a void Patent, tho' it be granted when the Sheriffwick is vacant, yet the new Sheriff shall have it. And in all Writs directed to the Sheriff concerning the County-Court, the King saith, *In Comitatu tuo*, and in Retorns of Exigents made by him he saith, *Ad Comitatum meum tenet*.

4 Rep.
Mitton's
Case.
4 Inst. 266.

In False Judgment it is said, *In pleno Comitatu tuo Recordari facias Loquelam, &c. Sub sigillo tuo, &c.* Also in a Precept of Tolt, to remove a Plea out of the Court Baron into the County Court, it is, *Summoneas, &c. qd' sit ad Comitatum meum.* And it is the Sheriffs Court, tho' the Suitors are Judges.

The Style of the Court is,

Buck's. *Curia prima Comitatus E. L. Mil', Vice-comitis Comitatus prædicti teni' apud B. &c.*

And the next Court, *Curia secunda*, and so forth.

By Pre-
scription
the Sheriff
may be
Judge.

Tho' it be said commonly, that the Suitors are Judges; yet by Prescription the Sheriff may be Judge, as it was in *Car. 2.* There is a Court called *Curia Comitatus*, in the County Palatine of *Durham*, and the Sheriff is Judge: And tho' in the County Court the Suitors are Judges; yet by Prescription it may be held before the Sheriff, 2 & 3 *Ed. 6. c. 25. Vid. Stat. Mod. Rep. 172.*

As a Court Baron by Special Prescription may be held *Coram Seneschallo*: So in *Norton's Case*, Indictment was brought of *Perjury* in a Plea depending in the County Court, in *Action on the Case* for 3 *l.* Errors assigned were, First, It is not said how the Plea was depending, as by *Justicies* or *Plaint Entred*: And, Secondly, It is said, in the County Court held *coram* the Sheriff & *Señatoribus*, and saith not *per Consuetudinem, quæ Curia concessit*, 3 *Keb. 370. Dou' Rex and Norton.*

The Jurisdiction of the County Court.

This Court holdeth no Suits of Charters for Lands, or for Inheritance, or to make several Plaints upon one entire Debt; nor any Action to compel one to render an Account, tho' it be under 40 s. because the Sheriff cannot assign Auditors, who are Judges of the Record, and the County Court is no Court of Record. ^{2 Inst. 380.}

And they cannot hold Plea of any Debt due by Record.

In Action of *Trespass* there holden, no Force shall be supposed.

It holdeth no Plea of Debt or Damages to the value of 40 s. or above; but by *Justices* he may. *Vid. infra.*

Nor of any *Trespass Vi & armis*; because a Fine is due therein to the King, and no Court can assess a Fine, but a Court of Record. ^{2 Inst. 311.}

Yet if the Debt be 40 s. or above, and the Plaintiff will acknowledge in his Declaration the receipt of so much as to bring it within 40 s. in this case the Plea is good: But he cannot split a Debt into several Actions, and if he do, the Defendant may plead the same to the Jurisdiction of the Court; or may have a Prohibition to stay that Indirect Suit, or move for Attachment against the Steward. ^{Id. ibid.}

It is holden once every Month, upon a Day Time certain, the Month being computed according to 28 Days; and the Reason is, because of the Writs of *Exigents*, which must be Proclaimed there, 9 H. 3 c. 3. 2 Ed. 6. c. 25.

Vide tit. Outlawries.

The County Court is kept once a Month at a Day certain; because the Kings Writs of *Exigents* are to be Proclaimed there, and the *Exigent*

The Office and Duty of Sheriff, &c.

is to be directed to the Sheriff in this Court, and he upon the *Exigent* doth proclaim, or call the parties (Sued in Courts above) to render their Bodies, &c. or else to be out of the King's Protection. And the Coroners are to sit with the Sheriff at every County Court, there to give Judgment upon Outlawries. And as to these Matters, the County Court is a Court of Record. But in London, the Judgment upon *Utlaries* is given by the Recorder, *Co. Litt.* 288.

Place.

This Court may be kept at any place within the County, at the Sheriffs pleasure; but not out of it.

But by *Stat.* the Sheriff of *Northumberland* is to hold his County Court in the Town or Castle of *Alnwick*, and in no other place.

Dalton

157, 158.

The Sheriff of *Suffex* is to hold his County Court one time at *Chichester*, and another time time at *Lewis*; and so *alternis vicibus*.

The Process.

The Original Process of this Court, (*viz.*) *Summon*, *Attachment* and *Distress Infinite*. A *Distringas* or *County Warrant*, is a Precept issuing out for a Debt under 40 s. And its Form is thus:

Præcept' est Ballivo ibid', Qd' Distingat F. D. per omnia bona & catalla sua, qd' sit ad prox' Comitatus meum ad respond' A. B. de placito debiti, &c. Teste, &c.

If on Trespass;

Præcept' est ibid', Qd' Attachiat' C. D. per omnia bona & catalla sua, qd' sit ad prox' Comitatus meum de placito Debiti, or Transgressionis, &c.

And

And the Goods or Chattels, whereby the Defendant is so Attached or Distrained, the Bayliff shall keep them till the next County Court, except the Defendant replevy the same by two Pledges distrainable within the County; which Pledges shall become Sureties, that the Defendant shall appear at the next Court, to answer the Plaintiff in his Plaint: But if he do not replevy the Goods, and that the Defendant makes default at the next Court (at the Day given him by the Attachment) the Court shall award the Goods so Attached to be forfeited, and shall keep the Goods so forfeited.

So in Distress, which must be plevied by four Mainpernors.

If the Distress be mainprized, and the Defendant makes default of Appearance, the Court shall amerce the Defendant and his Mainpernors. And in both Cases the Defendant shall be Distrained again to be at the next County Court. And the Entry is thus:

J. S. *opp^o se versus C. D. de placito debiti, &c. & The Entry ipse non venit; & Ballivus retornavit, qd^o distrinxit of an Alias cum per unum bovem pretii 9 s. Et manucap^t per Distingas. E. F. G. H. I. K. L. M. ideo in misericordia Et sicut prius Distringatur, &c.*

And so Process shall be made by Distress Infinite.

Note, For every default of Appearance the *Dalt. 503.* Defendant is Distrainable, till he come into *504.* Court.

Note, That the Goods attached or distrained in the County Court (whether upon a Justices, or otherwise) shall be forfeited on default of Appearance, by the Defendant, at the Day given him by the Process.

It

Of Execu-
tion in
Court-
Baron.

It has been a Question, How Execution shall be after Recovery in County Court? Not by *Capias* is agreed, except in *Wales*.

But by *Fitzherbert* 20. b. and *Finch* 68. the safest way (in this Court, and so in Hundred Court, or Court Baron) is to have an *Executione Judicii* directed to the Sheriff, &c. and then the Sheriff may make Execution, as in a Court of Record, by *Fieri fac'*, or *Levari*.

Duces tecum for
Non-
appear-
ance.

If the Defendant doth not appear the next Court after the *Distingas* executed, then there issues out a *Duces tecum* to cause him to Appear; and then an *Alias*, and a *Pluries duces tecum*, and so *ad infinitum*.

Summons.

The Sheriff may before any County Court award a Summons to his Bayliff, Returnable within two or three days, at his discretion, to summon the Defendant by his Goods, to Answer, &c. And If the Bayliff Return *Nihil*, and the Plaintiff removes the same by *Pone* into the *Common Pleas*, the Court shall not grant a *Capias*, 4 *Inst.* 266.

Pone.

The Sheriff before the next Court day after his Election, must depute and constitute a County Clerk to keep the Court; and the *Stat.* 1 *H. 5. cap. 4.* prohibits such a County Clerk to practice as an Attorney in the same year. And this County Clerk ought to Return no Plaints (except in case of Replevins) out of Court; but in full County *sedente Curia*; yet its now done otherwise.

County
Clerk.

Adjorn-
ment of
the Court
to a Day
certain.

And at the Adjoining of every Court he must appoint a Day certain for the next Court, to the intent the Country may know at what time to resort thither, to hear the Kings Writs of *Exigents*, and Proclamations Read.

Of Replevin, and the Sheriffs Office and Demeanor therein, and of the Retorns.

This being a main Branch of the Sheriffs Duty as to the County Court, I shall treat of it, so much as concerns the Sheriff and his Office.

Replevin is a Writ, and lieth where any man distrains another for Rent, &c. Then he who is distrained, shall have this Writ to the Sheriff (called *Replegiari Facias*) to deliver to him the Distress, and shall find Sureties to pursue his Action; or if he pursue it not, or it be found and adjudged against him, then he that took the Distress, shall have again the Distress; and this is called the Retorn of the Beasts; and in such a Case lies the Writ *de Retorn' Habend'*. This is when Goods are replevied by Writ, and is at the Common Law.

This Writ is *Vicountiel*, and in nature of a By Writ. *Justicies*, in which the Viscount shall hold Plea in any value, and is not Retornable; but it may be removed into the *Kings-Bench* or *Common-Pleas* by *Pone*: By the Plaintiff without Cause, *Pone*, and by the Defendant with Cause shewn in the Writ. *Co. Mag. Chart.* 339, 340.

If a Replevin be sued by Writ, and the Sheriff retorn that the Cattle are not to be found, then a *Witberman* shall be awarded against the Defendant; and if a *Nilil* be retorned, then an *Alias* and a *Pluries Witbernam*, and thereupon an *Exigent*. *Witbernam*

If the Defendant upon the *Retorn' Habend'* adjudged for him, cannot have retorn of the Beasts; and upon the *Retorn' Habend'* the Sheriff retorn that the Cattle, first taken, are dead, he may have a *Scire Fac'* against the Pledges; and upon a *Nilil* retorned on that, he may have a *Scire fac'*. *Scire fac.*

fac' against the Sheriff; for insufficient Pledges are no Pledges, 1 *Brownl. rep.* 168.

Replevy by
Plaint.

Replevin by Plaint, and that is by the Stat. of *Marlbridg.* c. 21.

The Sheriff by Plaint made without Writ, may either by Parol or by Precept command his Bayliff to deliver them, *i. e.* to make Replevin of them, *Col 2 Inst.* 139, 140.

When the Distress is taken and impounded *infra Libertates*, which have return of Writs, the Sheriff must make a Warrant to the Bayliff of the Liberty to make deliverance; and if he will not, the Sheriff may enter and do it. If the Distress be taken *extra Libertates*, and impounded within, the Sheriff upon Plaint made, may presently enter and make deliverance, *Co. Mag. Charr.* 139.

Sheriff
may break
Castle,
House or
Close to
make Re-
plevin.

If they are impounded in a Castle or House, the Sheriff may break it, and make Replevin, and he cannot return he was resisted, for he may take the *Posse Comitatus*, *Cok. 2 Inst.* 105, 194.

If the Beasts be imparked in a place inclosed which had a Gate open, and the Writ comes to make Replevin, and the owner stands at the Gate to shoot him, he may break the Close to make Replevin, 2 *Roll. Abr.* 565. b.

Replevin
made pre-
sently.

For necessity the Sheriff may enter a Plaint before himself, and after return it in the County Court, that so the Cattle may not perish, 1 *Keb.* 205.

He may take a Plaint out of the County Court, and make Replevin presently, and not stay till the next County Court, which is holden from Month to Month.

The man-
ner of Re-
plevying.

Cattle being distrained for Rent or Damage Fesant, &c. The Owner of the Cattle must go to the County Clerk, (or some Deputies in the County, for the granting out of Replevins) for

for a Replevy to be directed to the Bayliffs to replevy them; and the Party must be bound in an Obligation to the Viscount to prosecute his Action against him, or them that did take the Cattle, or to make retorn of the same Cattle to the Distrainer, if he by Justification or Avowry do recover. And if he pursue it not, or be found against him, then he that took the Distress, shall again have the Distress, and shall have a Writ from above, *de Retorn' Habend'* in such case.

*Retorn'
Habend'.*

If the Goods cannot be taken by the first Replevin, then issues forth an *Alias*, then a *Pluries*, then a *Toties*, then a *Witbernarn*. If the Sheriff retorn that he cannot replevy the Cattle because that they are Eloynd (or he cannot have the view of them) for the Sheriff must make enquiry if the Retorn be true; and if so, then he must make a Precept to the Bayliff in *Witbernarn*, i. e. to take as many other Cattle, and he may have an *alias* and a *Pluries Witbernarn*, and so *in infinitum*, but hath no other remedy in the County.

Retorn.

Witbernarn

This sort of Replevin may be retorned out of the County into the Court of *Common-Pleas* by *Recordare fac' Loquelam*.

Re. fa. lo.

The Sheriff upon a *Retorn' Habend'* may enquire the Kinds of the Cattle, if the Count or Avowry be uncertain, 1 Leon. 193. *Rigden & Palmer*.

In a Replevin, no such Beast, is not a good Retorn; but *Averia Elongata*, or *Null' Venit ex Parte Querentis ad monstranda Averia*. 2 Leon. 67. Sheriff on Replevin of Goods saith, that none came to shew him the Goods, its a good Retorn, 1 Keb. 184. for he cannot know the Goods without shewing of the Party.

What is a
good Re-
torn in Re-
plevin or
eor.

Sheriff
makes Re-
plevin of a
Stranger,
he is a
Trespasser.

If J. S. sue a Replevin to the Sheriff, and shews him the Cattle of J. N. and saith they are his Cattle, and he makes Replevin of the Cattle, he is a Trespasser to J. N. and the Sheriff may have an Action of Trespass against J. S. for his false Information: For the Sheriff at his Peril must take notice whose Cattle they be; but if there be any fraud in the matter, he may aver that, 3 H. 7. 14 H. 4. 1 Brownl. 211. *Buckwood and Beal.*

If a man have Judgment to have a Return upon a Nonsuit in a Replevin, and the Plaintiff brings a second Deliverance, this is a *Superedeas* of the Return; yet the Defendant in the Replevin shall have a Writ to enquire of Damages; but if he have Judgment in the second Deliverance, then it shall be returned *Irreplevisable*, and he shall recover Damages, *Hill. 43 Eliz. B.C. Goldsborough p. 185.*

If the Sheriff doth not his Office in such Cases, an Attachment to the Coroners lies against him, *Reg. Orig. 81. a.*

As to the Sheriffs taking Pledges, *vid. sub titulo Pledges, & infra.*

If the Sheriff return *fugavit* in another County, or that the Bayliff of the Liberty returns *elongata*, or that he cannot have the view, in all these Cases a *Witbernarn* shall be awarded, 1 *Rep. 145. b. Ann Mayowes Case.*

The Writ of *Witbernarn* ought to rehearse the Return of the Sheriff.

No more
Replevin
after Non-
suit, but
Second De-
liverance.

At Common Law a man might have been non-suited in Replevin, and have had new ones in *infinitum*. But *West. 2. c. 2.* restrains the Plaintiff for having any more Replevin after Non-suit, but gives the Writ of *Second Deliverance*, *Cok. 2 Inst. 240.* This Writ is a *Superedeas* in Law to the Sheriff, that he make no Return

return to the Defendant on the former Non-suit, *Cok. 2 Inst. 341.* This is taken away as to Avowry for Rents, by 2 *Stat. K. Charles 2.*

In a Replevin if the Process continue until a *Pluries* issue out of *Chancery*, and the Sheriff return upon this in *B.* that the Defendant claims property; altho' no day is expressly given by this Writ to the Parties, but to the Sheriff only to excuse his Contempt for not serving the Process before; yet upon the return of this Writ the Parties may appear and plead (*viz.*) The Plaintiff may declare, and the Defendant may plead to it, and it shall not be erroneous; for there is no other Writ to be served after this Writ; therefore if the Parties might not plead upon this, it would be a great mischief. So if the *Pluries* be returned *Tres Michaelis*, and nothing is done till *Pasche* afterwards, yet at this Term the Parties may appear and plead if they will, 1 *Rol. Abr. 581. Gawen and Ludlow.*

Where the Defendant, when the Sheriff comes to make Replevin, claims Property, the Sheriff cannot proceed; for it is a Rule in Law, the Property ought to be tried by Writ; therefore in that Case, where the Trial is by Plaint, the Plaintiff may have a Writ *de Proprietate Probanda* directed to the Sheriff to try the Property; and if it be found for the Plaintiff, the Sheriff is to make deliverance; if for the Defendant, then he can no further proceed, *Cok. Litt. 145. b.*

And to try the Property, the Sheriff ought to take with him *Custod' Placit' Coron'. Dier. 173.*

In Replevin the Plaintiff claims Property, and thereupon a Writ issues to the Sheriff to try the value, 2 *Keb. 550. Websterlyes Case.*

Where one sues a Replevin, but hath not the delivery of the Goods, and the other Avoweth, and the Plaintiff sheweth the Defendant is yet possess'd

Return that the Defendant claims Property.

Where in a Replevin the claim of Property by the Defendant shall hinder the delivery of the Goods by the Sheriff.

Gage-deliverance.

possess'd of the Goods, &c. and prays that the Defendant may gage Deliverance; then he shall put in Sureties and Pledges for the deliverance, and a Writ shall go forth for the Sheriff to deliver them.

Recordare.

Where the Replevin is by Plaint, there it may be removed out of the County into the *Common-Pleas* by *Recordare*, and the Sheriff hereupon is to summons the other Party to be in the *Common-Bench* or *B. R.* at a day Certain; and of all this he is to make Certificate under his own Seal, and the Seals of four Suitors of the same Court.

Two sorts of Pledges in Replevin.

In Replevin the Sheriff ought to take two sorts of Pledges by the Common Law, *Pledges de Prosequendo*; and by the Statute, *Pledges de Retorn Habend*, *Cok. Com* 145. b.

And Note, The Sheriff must take Sureties and not a Pawn.

Therefore where one brought Replevin, and the value of the Goods taken was 20 s. and the Bayliff took 3 l. 10 s. for Pledges, and not Sureties, and the Party brought an Action on the *Stat. W. 2.* and resolved that the Action lies, *Jones p. 378. Cro. Car. 446. Moyser and Grey.*

If Pledges *de Prosequendo* are not found, and Judgment given, the Process is erroneous, 9 *Rep. Husseys Case.*

May be found at any time before Judgment.

Scire fac.

against the

Sheriff upon

retorn

of *nihil*

as to the

Pledges.

But these Pledges may be found to the Sheriff, or in Court, at any time before Judgment, but not after.

If upon the Writ to have retorn of the Beasts of the Pledges, the Sheriff retorn *nihil*, then may the Plaintiff have a *Scire fac* against the Sheriff, *qd reddat ei tot Averia*, or *tot Catalla*; and so of a Bayliff of a Franchise, *Cok. Mag. Chart. 340.*

But

But as to the Pledges de *Retorno Habendo*, they are given by the Statute of *W. 2. c. 2.* and an Action is given against the Sheriff if they are not found; but this does not make the Proceedings erroneous. *Per totam Curiam. Jones p. 439. Grose and Boscarven.* So is *Tregoose and Winnell's Case.*

Pledges in Replevin on *Retorno habendo* were not taken by the Sheriff, according to the Statute of *W. 2. c. 2.* after the Plaint was removed into the Common-Bench by *Recordare*; yet Pledges may be found by the Court. For the Pledges given by the Statute of *W. 2.* are only to give Remedy against the Sheriff for his neglect, and the Pledges may be found at any time before Judgment, *Cro. Car. 594. Tregoose and Winnell.*

If a *Wisternam* be awarded for the Plaintiff *Wisternam* of the Beasts of the Defendant, and the Sheriff *nam: Retorn.* Returns he had taken the Beasts of the Defendant in *Wisternam*; but none comes from the Plaintiff to have them. And now the Plaintiff prays a Writ to the Sheriff, to deliver the *Wisternam* to him; and the Defendant prays, that the Plaintiff gage *Deliverance*; and saith, that part of the Beasts which he took are dead by the default of the Plaintiff, and the remnant he is ready to deliver. In this Case the Plaintiff shall

not have Deliverance of the *Wisternam* to him; but it shall remain in the custody of the Sheriff, until a Writ issue to the Sheriff, for the Plaintiff to have Deliverance of his Beasts; and then shall come in debate in whole default the Beasts are dead, 44 *Aff. 15.*

In what case the Plaintiff shall not have deliverance of the *Wisternam* to him.

Note, If *J. S.* be Sheriff, and the Distress be taken by him, there the Writ or Plaint shall be in Common Form, naming the Sheriff by his

F

Christian.

Christian-name and Sir-name — *qua* J. Scipit, and not — *qua* tu ipse cepisti; and the Sheriff in that case ought to make Deliverance, C. *Magna Charta* 139. *Reg. Orig.* 81.b.

Delivery
by the
Sheriff
must be
according
to the
Writ.

A Declaration in Replevin was for 100 Ewes and Weathers, and it doth not appear how many there be of Ewes, and how many there be of Weathers, and the Sheriff is bound to make delivery of the one sort and of the other: For the Delivery of the Sheriff must be according to the Writ, &c. and the Declaration was held ill. But Ewes without addition had been good enough, and the Sheriff must have delivered the one sort and the other, if the Writ be for *Oves matrices* the Sheriff cannot deliver Weathers: So if for black Horses the Sheriff cannot deliver white, but is subject to *Action on the Case*. *Allen* p. 33. *Moor and Clypsam*.

Of Returns.

De Pone.

The Sheriff Returns, He had attached the Goods *per plegios*, and the Form of such Return, *vide* 2 *Sanders* 333.

De Recordare fac' Loquelam, *Dalt.* c. 72.

Return' sur Replevin de return' habend', *Ibid.* c. 73.

Return' averia elongata, *vid.* *le Form* *ibid.*

Return', quod accessi ad locum, & visum habere non potui, *Ibid.*

Where the Plaint is in the County Court, of the taking and withholding Cattle and Goods; the Entry is thus:

J. S.

J S. queritur versus J. D. de p^lito Captionis & in-
justæ detentionis a veriorum ipsius J. S. contra
vad^l & pleg^l. Et invenit plegios tam de clamore
suo proseguendo, quam de averiis suis retornand^l, si
retorn^l inde adjudicetur, (viz.) J.D. & R.H.

• And the Precept of Replevin is thus:

War^l ff. **A** B. Miles, Vic^l Comit^l prædict^l Bal-
livo Handre^l de H. nec non J. S.
Ballivo meo hac vice; Et eorum ulterius conjunctim
& divisim, salutem. Quia W. P. invenit mihi suf-
ficien^l securitatem tam de clamore suo proseguendo,
quam de averiis suis, videlicet, bove uno quem J. C.
cepit & injuste detinet. ut dicitur retorn^l, si retorn^l
inde adjudicetur. Ideo ex parte Dom^l Regis vobis &
utrique vestrum conjunctim & divisim mando, qd^l
repleg^l & delib^l fac^l præfat^l W. P. bovem suum
prædict^l, (or, averia sua prædict^l, if several;) Et
quod ponat^l seu, &c. per vad^l & salvos plegios præ-
fat^l J. C. ita qd^l sit ad prox^l Comit^l meum apud,
&c. tenend^l ad respondend^l præfat^l W. de p^lito
captionis & injustæ detentionis bovis sui prædict^l.
Et qualis, &c. mihi ad prox^l Comit^l meum certifi-
cetur seu, &c. sub periculo incumbente; Dat^l sub sigillo
Officii mei die, &c.

Per me A. B. Mil^l,
Vicecom^l.

If this Replevin be granted by the Deputy,
then he must set his Name to the Replevin
thus:

Per me J. A. unum Depu^l dict^l Vicecom^l,
secundum formam Statuti.

The Office and Duty of Sheriffs, &c.

The Sheriff, or his Deputy, before this Precept made, ought to take (a Bond or Pledge) sufficient Security *De prosequen'*, or *Retorno habendo*. The Form of it is thus:

Noverint Univerſi per preſentes me Wilt P. de C. &c. teneri & tunc obligari A. B. Mil' Dic', Com' pred' in decem libris bone, &c. ſolvend' eidem Vicecomiti, &c. Ad quam quidem ſoluſionem, &c.

THe Condition, &c. is ſuch, That if the above-bounden W.P. do appear at the next County Court to be bolden at, &c. and then and there do proſecute his Action with effect againſt J. C. for wrongful taking and detaining of his Cattel, (viz. one Gelding, &c.) as is alledged, and do alſo make Return thereof, if Return thereof ſhall be adjudged by Law, and alſo do ſave and keep harmleſs and indemnified the above-named Sheriff, Under-Sheriff, and Bayliſſs, for, touching and concerning the delivery of the ſaid Cattle, That then, &c.

If the Sheriff delivered Goods, and the Plaintiff becomes Nonſuit, if the Defendant be ready in Court to avow the Taking, then there ſhall be awarded to the Defendants a Return of the Beaſts in this manner.

A. B. Mil', Com' pradiſſ' Ballivo Hundred' de H. &c.

Vide Dalt. 523.

Accedat

Accedas ad Curiam, Recordar' fac' Loquelam.

If False Judgment be given in any other Court Baron than in the Sheriffs County Court, then the Writ of *Faux Judgment* is called *Accedas ad Curiam*.

By this Writ the Sheriff must make a Record of the Plea, or Suit, in the presence of the Suitors, and annex the Record so made to the back of the Writ, and Return and certifie the same under Seal, and the Seals of the four Suitors.

Note, Nothing but the Plaint shall be removed, if they be at Issue.

The Form of the Return of the *Accedas*, *vid. Wilk. and Dalton* 200.

Vide Greenwood of Courts, and *Dalt.* c. 60.

And *vid. Greenwood of Recordar' fac' Loquelam*, and *Dalt.* 201, 242.

It's a good Return, that after the receipt of the Writ, and before the return thereof, no Court was holden, or that the Lord would not hold the Court, or that the Suitors would not deliver him the Record.

The Form of the Return of a *Pone in Replevin*, *vid. Dalt.* c. 70.

The Form of a *Recordar' fac' Loquelam*, *Id.* c. 72.

The Sheriff must openly read this Writ in Court, and return the same under his own Seal, and the Seals of four Suitors, and to summon the Defendant to appear at the Day of the Return. *Idem*.

The Return must be, *Recordari feci Loquelam, quæ est in eodem Comitatu coram Sectatoribus Curia;* (and not, *coram me*.) *Idibid.*

On this Writ he may return *Tardè*.

The Office and Duty of Sheriff, &c.

The Sheriff may send an *Accedas ad Curiam* by a Servant, and need not deliver it in person; as *Co. Burwell's Case*, 3 *Keb.* 249. *Reg. Orig.* 96.

Of the Writ of Justicies.

Retorn.

This Writ issues out of Chancery directed to the Sheriff, giving him Power to hold Plea in this Court for Actions of 40 s. or above, in *Debt*, *Detinue*, *Case*, &c. and other Actions personals. It is so called, because its a *Commission* (and not an *Original*) to the Sheriff to do a man Right and Justice; it is *Vicountiel*, and not *Retornable*. And tho' it be directed to the Sheriff, yet the Suitors are Judges, and the Writ of *Faux Judgment* lies on their Erroneous Judgment; and it requires no Retorn, unless the Action be removed by a Writ of *Recordare*; and then the Writ must be Retorned, together with the Record, *Fitzb. N.B.*

The Form is thus in Debt:

R *Ex Vic' Surr', salutem. Præcipimus tibi qd' Justicies d. quod juste & sine dilacione redd' B. 40 s. quos ei debet ut dicitur, sicut rationabiliter monstrare poterit, qd' ei redd' debet ne amplius inde clamorem audiamus pro defectu justitia, &c.*

And several other Forms. *Vid. Fitzb. N. B. per totum.*

In a *Justicies*; the *Justicies* may be holden of *Accomp't*; so of *Admeasurement of Dower*, *Admeasurement of Pasture*, when a Commoner puts in more Cattle than he ought; so of a Writ of *Covenant*, *Dalt.* 504.

So *Justicies de Curia claudenda*, that is, where a man ought to Inclose his Ground against his Neighbour's Ground; so of *Debt*, for Money,
or

or other Goods, and Detinue: So a *Justicies* of *Nusance*; of *Trespas*; by *Justicies* of *Trespas*, the Sheriff may hear and determine of the *Trespas* by an Enquest of Twelve Men, according to the Order of Common Law: And the Plaintiff may Count to his Damage of 20 *l.* or more.

But if it be *vi & armis*, or *contra pacem*, the Sheriff cannot determine it, therefore that is usually omitted.

The Sheriff may hold Plea of a Bond of 1000 Marks, &c.

Justicies for 40 *l.* was held and determined before the Undersheriff, in the absence of the Sheriff; and a Writ of *Faux Judgment* lies, and not a Writ of *Error*, 2 *Leon.* p. 34.

Sheriff's Tourn.

The *Tourn* is a Court of Record, holden before the Sheriff, *Magn. Chart.* c. 17.

Leet is derived out of the Sheriff's *Tourn*, and after the grant of this derivative *Leet*, the Sheriff in his *Tourn* is not to meddle in the reach of this *Leet*; except in case of Negligence of the *Leet*, and unless it be where the *Leet* is forfeited into the King's hands. The Nature of it.

If one be under no particular *Leet*, he is within the Sheriff's *Tourn*.

And 2 *Ralb. Rep.* 74. the Sheriff's *Tourn* is the supream *Leet* of the County.

The Style is,

Vic' Franc' pleg' Dom' Regis tenet' apud L. coram Scyio. Vicecom' in Torno suo, &c. and not *Torn' Vic' tenet' die apud L.*

Or, *Cur' visus Franc' Dom' Regis apud B. coram Vicecom' in Torno suo*, and not *Torum Vicecomis Tenet'*, &c. for *Torum est nisi perambulatio*.

The Office and Duty of Sheriffs, &c.

The Tourn is incident to the Office of Sheriff, 4 Rep. 33. *Muson's Case*.

The Jurisdiction in respect of the } things Presentable.
place where.

What things are Inquirable in the Sheriff's Tourn, and what not.

Nothing shall be Inquired before the Sheriff in the Tourn, but Actions Popular, Common Nuisances, Affrays and Blood-shed, 4 H. 6. 10.

Affault made on a man is not Inquirable there, it being but a *Tort* to a particular person, for which *Trespas* lies, 4 H. 6. 10.

The stopping of Water; which is a Nuisance to the Country People, may be Inquired there; for it is popular: So of a Bridge, 4 H. 6. 10.

They may amerce for Common Nuisances; and so may Stewards of Leets, notwithstanding the Stat. of Marlbr. c. 18.

He may Inquire *de Affisa panis*, and *Cervitia non observata*, by Stat. Wallie in Magn. Charta 46. Coke.

If he find in his Tourn, that a person hath erected a Purpresture in the King's High-way, he may abate it, 29 Ed. 3. 21. b.

What is Presentable in a Franchise; as default in Repairing a Cawsey is not presentable in the Tourn, because out of his Jurisdiction being in the Franchise: But if the default be in the Lord for not Repairing it, this may be presented in the Tourn; because the Franchise was first derived out of the Tourn; 10 H. 4. 4. 17 Jac. B.R. Loader and Samuell.

In what cases what is presentable in a Franchise, is presentable in a Tourn, or not.

Where

Where and what Inquisitions or Presentments taken in the Sheriffs Tourn, shall be presented to the Justices of Peace, and how they shall proceed upon them.

By the Statute of 1 Ed. 4. c. 2. the Presentments shall be by the Sheriff at the next Quarter- Sessions, and there shall be Inrolled; and upon this they assess the Fines and Amerciaments, and shall make Process to levy it to the use of the Sheriff, Jones 300. Griffith and Bedle.

Sheriffs Tourn, when and where to be kept.

By the Statute of 21 Ed. 3. c. 15. the Tourn ought to be kept *infra mensem post Festum Paschæ, & post Festum Sancti Michaelis*, 31 Ed. 3. c. 13.

Who shall be amerced for not coming to the Sheriffs Tourn, or not.

Not a Baron; not Tenants in Ancient Demesne. I shall cite a Case or two as to Pleading in Actions about *Amerciaments*, for further Explanation.

Trespas for taking a Bullock. Defendant Justifieth, because at the Sheriffs Tourn, held *infra mensem Paschæ, (viz.) 18 Apr.* the Plaintiff was presented for not appearing at the said Tourn, being *debite modo summonitus*, and Amerced by the Jury, which was assented by four of the Jury at 40s. And after at the next Sessions of the Peace, (*viz.*) 22 Apr. it was certified and ratified by such Justices of the Peace; whereupon the Steward made a Warrant to him to levy it, and so sold it.

The

The Plaintiff demurs:

1. Because the Defendant doth not alledge, that the Tourn was kept *infra mensem post Festum Pasche*; but *infra mensem Pasche*, which may as well be before *Easter* as after, 21 *Ed.* 3. 15.

Affeer-
ment.

2. Because the Amerciament is alledged to be made by the Jury, and affeered by four of the Jurors, where it always ought to be affeessed by the Court; for its a Judicial Act, and shall be affeered by the Affeerers appointed, *Lib. Intr.* 119.

3. That the Amerciament was levied by the Defendant, as Bayliff by Warrant from the Steward of the Court, where (by the Statute of 1 *Ed.* 4.) it is appointed, that no Fine or Amerciament in the Tourn shall be levied, unless it be certified at the next Sessions of the Peace by Indenture, and Enrolled, and by Process made from the Justices to the Sheriff, &c. *Griffith and Bedle, Cra. Car.* 275.

Judgment for the Plaintiff.

In Trespass, the Defendant Justifies for an Amerciament set in the Sheriffs Tourn, and Exceptions were taken to it:

1. Because he Justified by *Præcipe* to him lawfully granted, and saith not at what place.

2. He prescribes for a Tourn to be held, and doth not shew any, or what Estate.

Prescrip-
tion by a
Que Estate.

And by *Hutton*, a Prescription for a Tourn, or an Hundred Court, by a *que Estate* is naught, because it lies in Grant, and is not manureable; but he ought to have said, That the King, and all they that were seised of the said Hundred have had, and from the time, &c.

And *per Cur.* Except he shewed before whom the Tourn was held, it was naught; and it ought to be holden before the Sheriff, 1 *Brownl.* 198. *Darney and Hardington.*

Oath

Oath of *Allegiance* to be taken every Sheriffs Tourn, *C. Magna Charta* 73, 147, 148.

Hundred Courts.

Vid. suprà tit. Bayliff.

It is derived out of the County Court, for the Ease of the People, as the *Leet* was out of the *Town*.

The Style is thus:

Curia E.C. Mil^r, Hundredi sui de B. in Comit^{us} B. tens^r, &c. coram A.B. Seneſchallo ibid^r.

Vide plus 4 Inst. 267.

And the Forms of proceedings in this Court.

Vide Wilkinson.

CHAP.

C H A P. VI.

Of the Original Proceſſes in Real Actions and Perſonal Actions, with the Returns, as Summons, Attachment, &c. Of Mean Proceſſes, what Arreſt by the Sheriff or Bayliſſ ſhall be good or not: Of the Bayliſſ ſhewing his Warrant: What Arreſt is good as to the time of the Arreſt, before or after the Return, in reſpect of the perſons Arreſted, who are privileged or protected from Arreſts or not, in regard of Perſons or Courts: where Arreſt ſhall be Lawful or not, in reſpect of the Warrant. Of Warrants to Special Bayliſſes or known Bayliſſes: of Pledges de Proſequendo.

Of Original Proceſſes.

LET it be obſerved that regularly Writs are directed to the Sheriffs or Coroners, but in ſpecial Caſes to the Plaintiff himſelf or to others; to the Party, as a Prohibition, *ne exeat Regnum*; to others as to Judges Temporal and Eccleſiaſtical or Civil, to Serjeant at Armes, to Mayor and Bayliſſes; and where the Sheriff is Judge of the Court, a Writ which ſhould have been directed to him, ſhall be directed to the Serjeants of the Mace, *i. e.* where there are ſuch Serjeants, *Pract. Reg.* 345.

The Original Proceſſes in Real Actions is a Summons, ſo in all Perſonal Actions except in Trefpaſs, and in that there is no Summons; but Attachment and Diſtreſs in a Real Action, the Sheriff ſhall ſummons the Tenant upon the Land in demand; but in Perſonal Actions the Sheriff muſt ſummons the Defendant by his Perſon:
And

And in a *Præcipe* there ought to be two Summoners, i.e. two good substantial Neighbours.

If the Tenant be sufficient, he must return two common Pledges for the Plaintiff, and then the names of the Summoners thus,

Respons' A. B. Vic' Comit' infra script' plegij de prosequendo.

{ John Doe.
Rich. Roe.

Summonitores infra nominati, J. S. the Defendant.

{ W. Browns.
J. Cook.

But if the Tenant (or Defendant) be insufficient, then the Return must be thus.

Respons' A. B. Vic' Com' infra script' plegij de prosequend'.

{ J. Doe.
R. Roe.

Infra nominatus J. S. nihil habet in Balliva mea per quod (or unde) summoniri potest, nec est invent' in eadem.

(If it be in any Real Action, or in any Action of Annuity, Debt, Covenant, or other Writ where Summons lieth.)

If in Trespass, it is thus,

Infra nominatus C. D. nihil habet in Balliva mea, per qd' Attachiari possit, nec est invent' in Balliva mea.

If

The Office and Duty of Sheriffs, &c.

If two Defendants, name them; if more name the two & *ceteri Defendentes infra nominati nihil habent.*

If upon Distress, then thus,

Infra nominat' A. B. nihil habet in Terra, Tenementis & Hereditamentis infra scriptis per quod ipsum distringere possum.

If the Sheriff will delay the execution of the Writ he may return it in two manners.

1. *Infra nominat' J. S. non invenit mibi pleg' de proseguendo; for in all si fecerit te securum.*

The Sheriff is to take Sureties or Pledges of the Plaintiff, or else he need not execute the Writ.

2. *Istud Breve mibi deliberat' fuit, (or mibi venit) adeo tarde, qd' illud exequi non potui propter Brevitatem temporis.*

And the Sheriff may return *tarde* in every Writ, except in an *Attachment* and in a *Capias*.

But these Returns must be true, or else the Sheriff is punishable.

Attachment is by goods and differs from an Arrest which is only of the Body of a Man.

The Form of the Attachment is,

Pono per vadios & saluos plegios B. qd' sit coram, &c. ad respond' A. de placito, &c.

At:

Attachment may be made by Pledges as well as by Goods (*scilicet*) by finding Pledges or Sureties to appear. The Pledges shall not be bound in any sum, as Mainpernors are, and they shall be amerced, if he appears not.

Where the Writ is, *Pone per vadium & salvos plegios*, there if the Sheriff find the Party, he may attach him by his Pledges; if he find him not, he may attach him by his Goods. *Fitzb. Ret. de Vic. 57.*

For Offences against the Crown which touch Life and Member, the Attachment shall be by the Body.

If the Defendant be attached by his Goods, the Return must be

J. D. infra nominatus, Attachatus est per unam patellam pretij 10 d. If of dead things, ad valentiam, &c.

The Form of the Return of *Distringas*, *Vide Dalton, 223.*

In Debt or Trespass upon the *Distringas*, the Sheriff returned but 6 d. Issues, and was amerced for it.

Tho' the words of the *Distringas* be *qd' distring' per omnes Terras & Catalla sua in Balliva tua*, yet the Sheriff ought to distrain him but reasonably, and not according to the words of the Writ, *Kiel. 117.*

Mean Process.

What Arrest by the Sheriff or Bailiff shall be good and lawful or not, either as to the manner of Doing, the Time, or in respect of the Warrant or the Persons Arrested.

As to the Manner,

Shewing
the War-
rant.

It's commonly said, a known Bayliff need not shew his Warrant altho' it be demanded, nor a special Bayliff without demand: As to *London*, in *Mackally's Case* its said, the Serjeant need not to shew his Mace, because he is sworn and known, altho' not to the Party, 9 Rep. *Mackally's Case*.

And yet in the *Countess of Rutlands Case* its held a General Arrest by a Serjeant by shewing his Mace and touching his Body with it, by saying Sir *I Arrest you*, is insufficient, for he ought to shew at whose Suit, out of what Court, for what, and of what Return, that the Party may know what to do, 6 Rep. 52.

Where the Sheriff doubting a Rescue, causeth the Serjeant of the Mace to arrest one first on an Action of 100 l. entred in *London* according to Custom, and after the Sheriff arrests him by Cap' *ad Satisfac'*, this is unlawful, and the Serjeant was severely punished, and the Court disliked such feigned Actions against Law. 6 Rep. 52.

The Sheriff must not dispute the Authority of the Court, tho' the Process be erroneous, *Vid. infra*, & *Dalt.* 106, 107.

If the Officer comes to Arrest a man, and he flyeth, the Officer may pursue him and take him in another County, but he cannot beat him, &c. because he was not arrested. If the Arrest

Arrest of Bayliff he flyeth or draws Weapon, he may.

If a Special Bayliff by force of a Warrant on Arresting a *Capias* in Proceſs, enters into the Houſe of *J. S. J. D.* in a the Door being open, and there takes *J. D.* Strangers Houſe. againſt whom the Writ is, the Proceſs is well ſerved as to *J. D.* and all Strangers: And if any Stranger reſcue him, he at whoſe Suit he is arreſted ſhall have Action againſt him. 2 *Rolls Abr.* 277. *Hodges and Marks Caſe.*

A *Capias* was retornable on *All Souls Day*, which is *non dies Juridicus*, which the Sheriff retorned, and ſo let the Party go, it is a bad Return; the Writ was good, and the detaining of the Party on it Lawful, and he was commanded to bring him into Court. *Pop.* 205.

As to the Time.

If the Sheriff arreſt a man before a Writ to him delivered, it is a Treſpaſs; yet in the pleading he need not ſay that the Writ was delivered. It ſhall be intended that the Bill of *Middleſex* was delivered to the Sheriff before the Arreſt, and before the Warrant made: For the Arreſt being after the proſecution of the ſaid Bill of *Middleſex*, and it being ſaid in the Plea, that the Bill was proſecuted *per qd* the Sheriff makes his Warrant, it ſhall be intended to be delivered to the Sheriff before the Warrant made: And if it were not ſo, the Plaintiff ought to have ſhewed it in his Special Replication; but he having demurred to it has loſt the advantage.

If a *Latitas* retornable *die Luna prox^a poſt cras^a Sanctæ Trinit^{is}* (which is the 10th of July) comes to the Sheriff to arreſt *J. S.* he may arreſt him on the ſaid 10 day of July. 2 *Roll. Abr.* 378. *May and Hoper.* So a *Capias* in Proceſs may

Of Arreſt before the Writ delivered.

Intendment in Pleading.

Arreſt on the day of Return, good.

be executed the day of the Return. So a *Capias ad satisfaciend'*. But

But not after the day of the Return, and before the *quarto die post*. The Sheriff upon a *Capias* in Process, may not arrest the Party after the day of the Return and before the *quarto die post*; as if the Writ be returnable *Octab' Pur'*, which is the 9th day of *Februarius*, and the Sheriff arrests him on the 10th day, the Arrest is ill; for the *quarto die post* is but a day of grace, and the party may appear before that day if he will. 33 H. 6. *Siderfin* 229.

His Office *quoad* arresting is determined on the *Effoyn day*. *Ellis and Jackson*. And tho' the Sheriff may return his Writ after, yet his Office *quoad* arresting is determined on the *Effoyn day*, so that *Dalton* p. 116. is not Law. 1 *Keb.* 718. *mesme Case*.

An Arrest in the House, the Door being open at six of the Clock at Night is good enough.

By the late Act of Parliament none can be Arrested on *Sunday*, except for Treason, Felony or breach of Peace.

In respect of the Persons Arrested.

As if he Arrest one person for another, and one that ought not to be Arrested on the account of Protection or Priviledge.

The Sheriff had Process against one *Adderley*, and he took one *Adderby*; if he were known by one Name or the other, it is good, *alst'* not. *More* 407. n. 548.

He ought at his peril to take notice of the Person and Goods, but whether Original be sued out. If the Sheriff executes a *Capias*, and there is no Original to warrant it, he is excusable, but he must take notice at his peril of the Person and Goods that he Arrests, for he is not to examine whether the Original be sued out or not: But if he arrest *J.S.* instead of *J.N.* he does it without Warrant.

Capias

Capias against G. and E. B. affirms himself to be E. and is taken, yet this shall not excuse in false Imprisonment; the same Law of a Commission of Rebellion. *Hardress* 323. *Thurbane Case*.

As concerning priviledged or protected Persons, let us see who are priviledged from arrests or not

Here I shall briefly say something of a *Non omittas*; of the Office and Authority of the Sheriff on it.

Stat. W. 2. c. 39. gives it: For when Bayliffs of Liberties had return of Writs, upon a *Mandate* to them, they would do nothing. Now a Remedy is given by this *Stat.* commanding the Sheriff *qd' non omittat propter aliquam Libertatem, quin exequatur Præceptum Dom' Regis. 2 Inst. 451.* And

If a Bayliff make an insufficient Return, a *Non omittas* shall be granted. *2 Roll. Rep. 336.*

Attachment is a *Non omittas* in it self, ergo the Sheriff may break the House to take the Person. *1 Rep. 18, 33. 5 Rep. 92.*

Form of pleading *Non omittas, Cap' ad Satisfaciend'*, and on *Mandavi Ballivo, Return, Arrest,* and *Escape. Vid. 2 Sand. 98.*

Pleading *Non Omittas, Fieri fac'* upon *Mandavi Ballivo* returned. *1 Sand. 304.*

Peers of the Realm are Priviledged; so Dut-^{Peers}chesses and Countesses by Discent or Marriage, as in the *Countess of Rutlands Case*, There the Sheriff was excused by the Writ, tho' it appears in that she was a Countess, *Coke 6 Rep.* for the Officer ought not to dispute the Authority of the Court; But *Cap'* upon Contempt, as *Rescous*, &c. lies against a Peer. *Dalt. 104.*

The Body of a Peer may be taken in Execution upon a Statute, if he had not Goods nor Lands extendible. *Dalt.* 105.

Clergy. Ministers in the Church are priviledged from Arrest. *Artic' Cler' c. 3. 1 R. 2. c. 15. 1 Maria. c. 3.*

Kings Servant. *Wiltshire*, Undersheriff, was imprisoned by the Lord Chamberlain for arresting Sir *George Hastings*, Servant to the King, upon a *Cap' Usilagoi'*. *Litt. Rep.* 65. *Wiltshires Case*.

Per Cur' He may well arrest him, for it is at the Suit of the King himself, and he is sworn to serve it. And by all the Judges of *England*, he who procured the Commitment of the Undersheriff ought to pay all the Charges and Expences. And it is adjudged in *1 Keb.* 40. The Kings Servant is not so Priviledged from arrests; but that the Sheriff ought to return his Writ unless he shews his priviledge on the Arrest.

The Queen, or Queen Dowagers Servants are not priviledged.

In the *King and Moulsons Case*, the Court declared their Opinion to be, That none of the Kings Servants in Ordinary can be arrested without notice first given to my Lord Chamberlain, who cannot priviledge any perpetually, but in convenient time must either remove such, or make them pay their debts; but if the Bayliffs, without notice, do arrest any such, the Messengers of my Lord Chambelain cannot rescue the Prisoner by Letter (the Arrest being lawful) nor by Warrant, but the Party is punishable for his contempt, for no man can know the Kings Servant by his Face, but he may shew his Priviledge on the Arrest.

Rescue.

They also conceived the Warrant of my Lord Chamberlain to the Messenger to take all persons that detain such Prisoner, is a Rescue and against Law,

Law, and is to be only against the Plaintiff that sued, for the Bayliffs had the Kings Warrant to arrest, and had no notice before the Arrest, that he was the Kings Servant. This was Sir *George Hamiltons Case* one of the Privy Chamber. 2 *Keb.* 3.

If a Parliament man be arrested on Mean ^{Parliament} Process, or taken in execution, it's proper for may. the Parliament when they meet, to discharge him, for in Sir *Rich. Temples Case*, the Justices doubted whether they could do it or not. *Twisden* demanded why he did not sue his Writ of Priviledge out of *Chancery* upon the return of his Election. *Siderfin* 42. 2 *Keb.* 3. Sir *R. Temples Case*.

Clergy-men called to the Convocation have the same priviledge as Parliament-men have. *Dier* fo. 60.

By the Court of *Chancery* one was discharged ^{Chancery} from an Arrest, being done as he came to put ^{Priviledge} in his Answer. 1 *Rep. in Cb.* 92. & p. 22. There is a Chancery-priviledge from Arrest, and priviledge in other Courts for Officers and Attorneys.

As to Protections the 2d *Instit.* p. 56. upon ^{Protections} *Stat.* is very full. All Protections that are not Legal, which appear not in the Register, or warranted by our Books, are expressly against the branch of *Magna Charta* 1 *Inst.* 131. *Nulli differemus justitiam*. As a Protection under the Great Seal granted to any man, directed to the Sheriff, &c. commanding him that they shall not arrest him during a certain Time, at such a mans Suit, which hath words in it, *per Prerogativam quam nolumus esse arguendam*. 2 *Inst.* 56. This Protection was adjudged to be void.

In respect of the Warrant, what is good or not to justify Arrest: Or where Arrest shall be lawful or justifiable by force of a Warrant or not, and where its good without shewing the Warrant.

A Warrant made to three conjunctions & division; this being a Warrant for execution of justice may be sufficiently executed by two. 2 *Rel. Rep.* 137. *White and Usher.*

So a Sheriff makes a Warrant to four & cuilibet eorum, qd' ipsi caperent: Two of the four take him, it's good. *Telv. p. 25. King and Hobbs.*

Diversity
between
Warrants.

For Warrants of this kind are not to be resembled to Warrants or Authority to make or take Livery.

A Warrant to two men jointly to Arrest another, either of them may do it. *Cok. Litt.* 181. *Vide Crok. El.* 913. *Mesme Case.*

Warrant
false as to
Misnomer.

The Sheriff upon a Bill of *Middlesex* makes his Precept to the Bayliff of *Westminster* to arrest *J. Ferrers* Kt. *ubi revera* he was not Knight but Baronet; this was not a good Warrant, and the Deputy Bayliff being killed by Sir *John's* Servant, it was not found murder in the Servant, because his Warrant was not good, and upon the Tryal he was acquitted. *Jones p. 346. the King and Ferrers.*

The Sheriffs Bayliffs cannot execute a Writ directed to the Sheriff without the Sheriffs Warrant, and if he do he is liable to an Action.

If the Writ comes out of the *Kings Bench*, then the Warrant must be, *Ita qd' habeam Corpus ejus coram Dom' Rege, &c.*

If out of the *Common Pleas*, then it must be *Ita qd' habeam Corpus ejus coram Justiciariis Dom' Regis, &c.*

Where the Warrant ought to be shewed or not.

If three Writs of *Capias* in Process at the suit of *J. S.* against *J. D.* are directed to the Sheriff, and the Sheriff makes three Special Warrants to one Special Bayliff; and he comes to *J. D.* and arrests him generally, without shewing him in what Action, neither is it demanded of him; but presently upon the Arrest, a Stranger Rescues him, Action on the Case lies against the Stranger for all the three, for this was an Arrest in Law upon all. *Tr. 16. Jac. Hodges and Marks.*

A General Arrest upon three Special Warrants.

So if the Writs and Warrants were at the suit of three several persons, and the Bayliff arrests him generally as before, for this is a good Arrest for all, and all shall have Actions for the Rescue. *Id. ibid.*

He is not bound to shew his Warrant at first, or to shew at whose Suit it is, before he had peaceably submitted to the Arrest. *Cro. Jac. 15. Hodges's Case.*

But in the Countess of *Rutlands* Case it is holden, when the Sheriff or other person by his Authority arrests another, he ought upon the Arrest to shew at whose Suit, out of what Court, for what Cause, and when the Process is returnable, to the intent that if it be upon Execution, he may pay it, and free his Body, or agree with the Party, or put in Bayl according to the Law, and to know when he should appear. This is meant after a peaceable submission, *Cro. Reports*, the Case of *Hodges and Marks* thus, which is a Leading Case in the Point. But when the Party makes resistance or flyeth, he need not make such Declaration.

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The Bayliff who had two Warrants against one, at the Suit of J. S. laid his hands on him, and having both the Warrants in his Pocket, he said I arrest you by force of a Warrant I have, but did not shew it him, nor had it in his hands, nor told him at whose Suit. (This was not a Bayliff *comus*.)

The Court resolved, 1. This Arrest without shewing the Warrant and telling at whose Suit till the other demanded, is legal.

2. This Arrest without having the Warrant in his hand, and having both Warrants about him, is well enough, tho' he did not shew by which of the Warrants he arrested him. For he being under the Bayliffs Arrest, is in custody there for all Causes, for which the Sheriff had made his Warrant against him, tho' the Sheriff or Bayliff do not mention any specially.

Special
Bayliff.

And *Rolls C. J.* in another Case, took this difference ; a Special Bayliff is bound to shew his Warrant to the Party whom he is to arrest, otherwise the Party arrested is not tyed to obey him, but he is not bound to shew his Warrant to a Stranger.

A known
Bayliff.

But a known Bayliff, *i. e.* one that is commonly known, is not bound to shew his Warrant to any.

A sworn and known Officer (be he Sheriff, Undersheriff, Bayliff or Serjeant) need not shew his Warrant, yet upon the Arrest the Officer ought to declare the Contents of the Warrant, *ut supra*.

If Officer arrest a man before he has a Warrant, and afterwards procures a Warrant, yet the first Arrest was unlawful.

So

So if the Officer do make a Warrant for Summons or Arrest, not having the Original Writ or Process warranting the same, if it appear to the Judges, they shall commit the Offender to the Gaol till he has paid 10 *l.* to the Party grieved, and 20 *l.* to the King. But a *Capias* without Original, is sufficient Warrant to the Sheriff. 43 *Eliz. c. 6.* 1 *Jac. c. 25.*

Of Pledges de Prosequendo.

The reason of Pledges in Actions is, 1. Security for the Kings Fine. 2. For the benefit of the Defendant, if Judgment be given against the Plaintiff. Taking of Pledges is to the intent that the Party Plaintiff, shall prosecute his Suit. The reason of Pledges.

The Sheriff was at election (formerly) whether he would serve the Writ or not if Pledges were not found, but now its held they may be found hanging the Writ: Formerly if the Plaintiff sued one unjustly, the Judges would amerce the Plaintiff grievously till the Statute of *Moderata Misericordia* was made. 3 *Bulst. 277.* Dr. *Hussy and More.*

Now if no Pledges be returned, it's not aided by Jeofaile. *Stat. 18 Eliz.* which aids insufficient Returns, but not no Returns, and therefore the Person against whom to have Judgment is not returned, for the Judgment ought to be against the Plaintiff and his Pledges, and so this is no Return. 1 *Rol. Rep. 447.*

If upon the Original Writ, Pledges be not returned (because the Writ commands that if Pledges be found, that then, &c. and it is to the Kings disadvantage if Pledges be not found at the loss of his Fine) it's error. But the Sheriff may make Replevin without Pledges finding, and it is at the Sheriffs peril if he doth not take Pledges.

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Pledges. *Vid. supra tit. Replevin. Cro. Car. 594. Tregoose and Winnele.*

In B. C. Pledges must be endorsed on the Original, tho' they may be filed at any time after the Return thereof. *2 Keb. 299. Hedges Case.*

Vide pluris sub titulo Replevin. Vide supra sub titulo sur Summons and Attachment.

King or Infant not to find Pledges.

Neither the King nor Infant shall find Pledges, for no Amerciament shall be upon their default, therefore it were in vain for them to find Pledges.

2 Leon. p. 4.

President.

Scire fac' against the Sheriff for taking insufficient Pledges. The Form of the Sheriffs returning that he had attached the Defendant by Pledges. *Hutt. p. 77. Trevor and Michelborn. 2 Sand. 333.*

C H A P. VII.

Of Bail. Of Special Bail. VVho shall take Bail, or not. Of Bail Bonds. Explication of 23 H.6. c. 10. The design of the Statute. The Form to be observed according to the Statute. VVhat Obligations and Conditions are within the Statute, or not. In respect of the Persons and Officers to whom they are made. In respect of the Form; Of the Courts, and of the Sureties. The meaning of the words colore Officii. Of the pleading the Statute of 23 H.6. And when and how to be pleaded. What Appearance to a Sheriffs Bond is good, or not. Of the Sheriffs Return on taking Bail. Of Insufficient Bail. Of refusing Sufficient Bail; and the Remedy against the Sheriff for so doing. The Sheriffs pleading this Statute in Actions brought against him. Of Bail Bonds, being discharged or assigned. Of other Bonds, besides Bail Bonds, entred into to the Sheriff; As for being a true Prisoner; Saving harmless from Escapes; For Fees, &c. And the Pleadings thereunto, with all the late Cases and Resolutions relating thereunto.

Of Bail.

BAil is so called, because the Party bailed is delivered by Law into the Custody of those that are his Bail, and who are to answer the party if they do not produce the Principal to do it.

The cause of Marking the Roll for special Bail in the Kings-Bench is, because the Cause of Action does not appear upon the *Latitat*, by which the party is Arrested, but it is made appear^{Special Bail in B.R. on Latitat, and in B.C. on Original.}

appear by the Declaration ; but in the Common Pleas, where they proceed upon Original, the cause of Action does appear.

One in Execution in Custody of the Marshal, not compellable to find Bail if another Action be brought against him.

Aliter in the Fleet. Who shall take Bail. In London.

Now one that is in Execution in Custody of the Marshal of the Kings-Bench, is not compellable to find Bail, if another Action be brought against him ; but if he be in the Fleet on Execution, and an Action be brought against him in the Kings-Bench, he must either be Removed and Committed to the Custody of the Marshal, or else he must put in Bail to the Action.

It is the Common Course of London, upon Complaint before the Sheriffs, and a Precept to the Serjeant to Arrest one, the Sureties shall be found and offered to the Sheriffs, not the Serjeants. So in Inferiour Mayor's Courts, *Widow and Clark's Case*.

Therefore in False Imprisonment the Defendant pleads the Custom of London, That on Entry of a Complaint in London, a Serjeant may by Parol, or otherwise, Arrest the Defendant to answer the Plaintiff, and shews, That J. S. entred a Complaint in the Compter against the Plaintiff, and that he was a Serjeant, and Arrested him and carryed him to the Compter till he found sufficient Bail. The Defendant confesseth the Custom, the Entry of the Complaint and Arrest, and that he offered Security to the Sheriff ; and of this he gave Notice to the Defendant, and yet he carried him to the Compter. The Defendant demurs. *Per Cur^o*, The Serjeant, upon tender of Bail to the Sheriff, is not bound to set the party at Large, unless the Sheriff send a Warrant testifying this to him, *Jones's Rep. 226. Percivall and Salmon*.

Capias for the Good Behaviour.

If a *Capias* for the Good Behaviour be directed to the Sheriff by the Justices of Assize, and upon this the Sheriff makes a Warrant to J. S. to take him, who took him accordingly, and the

the party tenders J. S. sufficient Bail for his Appearance; and J. S. refuseth it and keeps him in Custody. This makes him not a Trespasser *ab initio*; for 'tis not his Office to take Bail, but the Sheriffs, 2 Roll. Abridg. 562. Adam's Case.

Neither the Sheriff, nor any Justice of the Peace, cannot Bail one taken by a Writ of *Cap'* one taken *Excommunicat'*. But he isailable by the Kings- *by Cap' Excom'*. Bench, 1 Bulstr. 122. Hall and King.

Capias must be taken out, and sealed and delivered to the Sheriff against the Bail, before he can be taken by a *Testatum* in another *Testatum*. County and because in Robinson's Case it was never delivered to the Sheriff, but all Returned in one Term, the Execution was set aside, 2 Keb. 424. Robinson's Case.

The *Scire facias* against the Bail, usually is left four days with the Sheriff before the Return of *Scire fac'* against the Bail. it; but if it be not it is well enough, 2 Keb. 229. Return. Barle and Potter.

Judgment in a *Scire facias* against Manucap- Return of tors, the Bail is liable by the Judgment; and if *Scire fac'* against the Manucap- tors. they be Freeholders in the same County where the Recognizance is made, then they must have notice and time; because the *Scire facias* may be Returned: But if they be Strangers, the Sheriff is not bound to warn them or give notice, Notice. but Return *Nihil* on both together; for this is but of favour to the Bail, who at their peril ought to bring in the Principal.

In Action brought against the Baron and Feme, and the Husband is only Arrested, yet the Husband must put in Bail for his Wife, if the Name of the Wife be in the Writ, else he is not bound to put in Bail for her; for it is the Writ that warrants the Bail, *Pract. Reg.* 43. Where the Husband must put in Special Bail for his Wife, or not.

Yet

The Office and Duty of Sheriffs, &c.

Yet in 1 *Keb.* 241. the Husband is not bound to put in Special Bail for his Wife, if she be not Arrested; but he must appear for himself and his Wife, and must find Special Bail for himself, 1 *Keb.* 241. *Nevill and Cage.*

Note, Where Bail is put in *De bene esse* (as in a Judges Chamber) the Plaintiff cannot Sue the Sheriffs Bond till it be refused or set aside; but he ought to except against it in the Judges Chamber, 2 *Keb.* 478.

But I think he may except against it after, within a certain time. According to an Old Rule, it was within 20 days.

Of Bail Bonds.

The Explication of the Statute of 23 H.6.

This Statute is frequently pleaded in our Books, and many Cases about the Nature of this Statute; and the Returns and Pleadings thereupon we meet with, which if methodically digested, would be the better and more clearly explained.

Let us see how the Law was at Common Law, and before the making of this Statute.

At Common Law, if the Sheriff had taken any man by the Kings Writ, he must not be delivered but by *Breve de homine replegiando*, and he was not compellable to take Bail of any, 2 *Sand.* 60.

*Breve de
homine
Replig'.*

But this Statute compels him to take Bail, and the design of the Statute is, to provide against the Extortion of Sheriffs, who would not deliver them without great sums, *Cro.El.* 808. *Sir George Clifton.*

Now

Now the Statute prescribes the Form, and that the Sheriff under colour of his Office should not oppress the party to make him any other Obligation, for the Statute makes the Obligation void for not pursuing the Form; but not in the Matter thereof. This Statute was made for the Prisoners benefit; for the mischief before was, That the Sheriff not being compellable to bail him, would extort Money to bail him, *Mod. Rep.* 228. Design of this Stat.

Now this Statute hath Three Branches, as it is in *Dive and Manningham's Case*, *Plowden*.

1. Commandment and Authority to the Sheriff, to let to Bail such persons as are Mainpernable: So it extends to Coroners, Stewards of Franchises, Bayliffs, Keepers of Prisons, &c.

2. A Restraining branch, That they shall not let to Bail such persons as be in their Ward by Condemnation, Execution, *Capias Utlagat*, or Excommunication, Surety of the Peace, and such as shall be Committed by special Commandment of the Justices, nor Vagabonds.

3. The third is, to make Obligations void, taken in any other form than the Statute limits; *That no Sheriff, nor any of his Officers and Ministers aforesaid, shall take or cause to be taken, or make any Obligation for any Cause aforesaid, or by colour of their Office, but only to themselves, of any person, nor by any person which shall be in their Ward, by the Course of the Law; but by the Name of their Office, and upon Condition written, That the said Prisoners shall appear at the Day contained in the said Writ, Bill, or Warrant, and in such places as the said Bill, &c. shall require: And any other Obligation taken by them in any other form, shall be void.*

Now

The Office and Duty of Sheriffs, &c.

Now there are Three Forms to be observed :

1. That it shall be made to the Sheriff himself.

2. Note these words (*For any other Cause*) refer to all that went before, as well those contained in the Exception, as in the First branch. Therefore a Bond taken of a man in Execution is void by this Statute, and the Surety may plead, this was taken by him in Execution as Sheriff, and and the words *colore Officii* make it void; for he he lets him to Bail who is not Mainpernable, *Plowd. 69, 80. Dive and Manningham.*

The Stat'
mistaken
in print.

3. Note also (*Nor any of his Officers*) it is not so, and the printed Statute is mistaken. It is not the Sheriff, nor any *de ses Officers*, (*or any of his Officers*) but not any *des Officers*; not *ejus Officiarii*, but *alii Officiarii*. And so is Old *Rastal* which is in French, and so Adjudged in *Langham's Case*.

In Debt on Bond to *Lentbal*, the Defendant pleaded it was for Ease; it was held to extend to the Marshal, tho' he is not one *de ses Officers*, but one *des Officers* and Ministers of Justice, *3 Keb. 71. Monday and Frogate.*

And if the Statute be mis-recited it may be demurred to, as it was in this very Case, *Cro. El. 108. Teussell and Acton.*

In this Statute are Three Forms to be observed :

1. That it shall be made to the Sheriff himself. *Vide infra.*

2. That it shall be made to him by the Name of his Officer.

3. That it shall be only for Appearance at the day and place, *Cro. El. 862. Cotton and Vale, 2 And. 175. mesme Case.*

But

But as to the Insufficiency of the *Sureties*, that is Matter and not Form; and the Obligation is not void. *Vide infra*.

The *Statute* prescribes the Form, and that the Sheriff under Colour of his Office should not oppress the party to make him any other manner of Obligation; for the *Statute* makes the Obligation void for not pursuing the Form, but not in the Matter thereof: Therefore the Sheriff may take one Surety, or one that has no Land in the County, *Cro. El.* 858. *Sir Geo. Clifton's Case*, *Mod. Rep.* 32. *Franklyn's Case*.

He must pursue the Form, not the Matter.

Per Hobart, ex Relatione Twisden: Because the *Statute* would make sure work, and not leave it to Expositions what Bonds should be taken: Therefore it was added, That Bonds taken in any other form should be void.

What Obligations and Conditions are good, or not.

1. In respect of the Persons and Officers to whom they are made.

2. In respect of the Form.

1. In respect of the Officers or Persons to whom made.

Such Bond given to a Deputy of a Bayliff of a Franchise is void, or to an Under-sheriff's Deputy; it must be to the Bayliff or Sheriff himself, *Noy p. 69. Tavernor's Case*.

To a Deputy of a Bayliff of a Franchise.

A Serjeant at Arms, attending on the President and Council of the Marches of Wales, is not an Officer within this *Stat.* *Cro. Car.* 9. *Johns and Stratford*.

Serjeant at Arms

H

If

Bayliff of
an Hn-
dred.

If the Bayliff of an Hundred, which is a Franchise, take Bond, he must do it in the Sheriffs Name, 3 *Keb.* 21, 117, 127. *Monday and Frogate.*

This Bond must be taken to the Sheriff himself, and not to another, *Dyer* 119. 10 *Rep.* 100. 7 *Ed.* 4. 5. *Plowd.* Com. 68. a. b.

Serjeant
at Arms
in Wales.

A Serjeant at Arms in *Wales* is not within the Stat. *Stiles* 234. *Barton's Case.*

The House of Commons had Voted one *W.* guilty of High Treason, and the Plaintiff being a Serjeant at Arms took the said *W.* into Custody; and the Defendant entred into Bond to the Plaintiff, Conditioned for the said *W.*'s Appearance, who did not appear: Debt was brought, and on demurrer. *Per Cur'*, It's a void Bond by the Common Law, being entred into for ease and favour of the Prisoner, and he was notailable. But the Court agreed the Plaintiff was not an Officer within 23 *H.6.* c. 10. *Obj.* The Condition recites the Bond was entred into for Appearance only, is an Estoppel to say it was for other Cause. *Per Cur'*, Here is no Estoppel; for Estoppel is when the Bond is a good Bond, then the Recital is an Estoppel; but when the Bond is void, the Estoppel is void too, *Hardress* p. 464. *Norfolk's Case.*

Serjeant to
the House
of Com-
mons.

A Serjeant to the House of Commons is not within this Statute, 1 *Keb.* 391. *Norfolk and Aylmer.*

This Statute doth not extend to Bond made to the Plaintiff himself, *Allen* p. 58. *Lesch and Davis.*

Not taken
by the
Sheriff in
the name
of his
Office.

The Bond not being taken by the Sheriff in the Name of his Office, in Debt upon the Bond, the Defendant demurs upon *Oyer.*

Sed non allocatur; for the Statute is not pleaded, ^{Pleading} and it may be for a just Debt, ^{the Stat.} 2 *Keb. 620. Jacques's Case.*

Marshal of the Kings-Bench is within this ^{Marshal} Statute, and if he takes Bond against this Statute ^{of the} 'tis void, *Cro. El. 66. Bracebridge and Vaughan,* ^{Kings-Bench} 9 Co. 98.

A Bond to *Neele*, Sheriff of *Warwick*, and the Bond was to *Neele Vic³ Com³ praed³*, and *Warwick* put in the Margent. *Per Dodderidge*, This is not a good Bond; he ought to be named Sheriff, and of what County, 2 *Rolls Rep. 360. Neele and Cooper.*

As to Appearance, where the Condition is good, or not.

An Obligation to the Sheriff, to *Appear and Answer, &c.* is void by the Statute of 23 *H. 6.* *Aliter* to Appear to Answer; for the party by the Law may Appear, yet Judgment may be given by default, *Noy 53, 54. Lord Ever's Case, Dyer 274. contra 172. Rowles and How.*

Condition to make an Appearance, *quare* if good.

Obligation was taken by the Sheriff for an ^{Appear-} Appearance at *Westminster*, and the Term was ^{ance, where} Adjourned to *St. Albans*, and the party appeared ^{the Term} there; he had not forfeited the Obligation, ^{is adjourn-} *quare. ed.* *Mo. n. 578. Corbet and Downing.*

The Obligation shall always relate to the day and place comprized, and he ought to appear at the Kings-Bench; or else he forfeits his Bond, *Mo. 466.*

The Condition was, If the said *J. D.* personally appeared, &c. *à die Pasche in 15 dies*, to Answer to *J. H.* as shall appertain, and farther to do and receive as the Court therein shall

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consider in that behalf, that then, &c. it's a void Bond, *Cro. El. 672. Scriven and Dyster.*

Bond for appearance before Proceſs comes to the Sheriff. If the Sheriff take an Obligation for the Appearance of *J. S.* before Proceſs comes to him to Arrest *J. S.* and after the Proceſs comes, this Obligation is good, *Siderfin p. 151.*

Bail Bond was to appear at *Westminster die Sabbati prox' post Purificat'*. to Answer; its ill, it was intended the Feast day, *3 Keb. 260. Rodd and Huans.*

Mistake of the Day. Bill of *Middlesex* was Returnable *die Veneris*, the Condition of the Bail Bond was, If the Defendant appeared *die Sabbati*, it is a void Bond, *1 Sand. 21, 22. Bennet and Filkins.*

To appear and answer. Condition to Appear and Answer is good enough, *2 Cro. 286.* tho' *Mildmay and Cage* his Case was Objected, being intended generally to answer any Action, and the Writ was of *Trespas*, *3 Keb. 422. Briscoe and Richardson.*

Insensible. The Condition of the Bond was, That if the Defendant do appear in *Banco Regis* such a day, then the Condition of the Obligation to be void; yet *per Cur'* both are good: For if these words were omitted, it is but Surplusage, *Siderfin 456. Maleverer and Hawkins, 2 Keb. 615. mesme Case, Mod. Rep. 35. mesme Case.*

To appear at *Westm.* To a Condition to appear before his Majesties Justices of Kings-Bench at *Westminster*. The Defendant pleads the Statute of *23 H. 8.* and that this was *alia forma*; it should be *coram Dom' Rege ubicunque, &c.* yet it was adjudged good. The Statute is not to be avoided by such mistakes of Retorns, *3 Keb. 551, 611, 627.*

So in *Cadwell and Dawkin's Case* the Condition was, *Ad respond' E. exee' in plac' Transf. de 100 l.* and the Writ was, *Ad respond' E. in placito Tresp' ac etiam billæ 100 l. de debito, &c.* this variance is not material, if the Bond be made in

in the name of his Office, and the Condition express the time and place of his Appearance, and at whose Suit, it is enough, *Cro. Jac. 286. Villars and Hastings*, *Sir Tho. Jones 137. Cudwell und Dawkin's Case*, so *Kerby and Curiss*.

The Condition is, If such an one who is To appear arrested on a *Latinar*, appeared personally and personally. answered, &c. in regard his appearance is necessary to put in special Bail, if the party require it, the Bond is good, *Cro. El. 776. Bowles and Hersteo*, *Dalt. 446. 10 Rep. 100.*

A Writ out of the Kings-Bench was Return-able out of Term, the Sheriff takes the party and takes Bond to appear at the day of the Return, and for Non appearance brought Debt on this Obligation: This Bond was void by the Statute, and the Sheriff shall not be amerced for Non-appearance, nor liable to any False Imprisonment by the party, 2 *Siderfin 129. Jenkins and Hatton.*

The Writ is *placito Transf.* the Condition of the Bond is to answer *Ac etiam billa 100 l. in placito debiti* is void, being another Writ; but if the Writ were in *placito debiti*, or the Bond taken only to answer the Writ in *placito Transf.* it were well enough. And a *Nil capiat per Billam* was awarded on Demurrer by the Plaintiff upon the Defendants Plea upon the Statute, it being in *alia forma*, 3 *Reb. 164. Mildmay and Cage*, and p. 711. *Moor and Finch.*

Ad respond' de platito debiti is good without mentioning the Sum. The Bond ought to be made to the Sheriff by the name of his Office, and ought to express the day and place of his Appearance, and these Circumstances being observed, tho' it be variant in other Circumstances, its not material, *Cro. Mich. 9 Jac. 286. Villers and Hastings.*

The Sheriff cannot take Bond to appear at another day than is contained in the Writ, 2 *Keb.* 526.

Bond taken by the Sheriff after the day of the Return void, and why.

If an Obligation be taken by the Sheriff after the day of the Return, its void by the Statute, and is not a single Obligation; and the Statute was made to prevent such great Oppressions, for the party so taken after the Return, may not be haled without coming before a Judge; and he may not do this out of Term without the Consent of the other party, *Siderfin* 301. *Courtney and Phelps*.

On Attachment out of Chancery.

L. gives Bond to the Sheriff, being arrested by Attachment out of the Chancery. The Condition was, That the Defendant should appear such a day in Chancery, *apud Westm' ubicunque fuerit*. This Bond is within the Statute; but here the Variance makes it void, *Ubicunque fuerit*, 2 *Keb* 526. *Leverer and Redshaw*, *Stiles* 234. *Burton and Low*, 3 *Keb.* 599, 614. *Kirby's Case*.

As to Courts.

The Sheriff, by virtue of an Attachment under the Privy-Seal of the Court of Requests, took the Defendant, and for his Enlargement made the Obligation to appear before the King's Counsel, &c. *Per. Cur'*, Here is no Warrant to take the Body, or the Obligation; for that Court hath not any power by Commission, Statute, or Common Law.

Dutchy-Court.

But the Sheriff ought to obey the Process out of the Dutchy Court, for that is appointed by Act of Parliament, but the other is not within the Statute, for the Statute speaks of such who are in their Custody by course of Law. So this Obligation is avoidable by *Dwres*, *Cro. El.* 646. *Stephens and Fludd*, 2 *Anderson* 122. *mesme Case*.

Plaint

Plaint in a Court-Baron of 39 s. and an Attachment against the Defendants Goods, and detained till the Plaintiff caused a 40 l. Bond to be made to the Plaintiff himself to appear and answer, and Condemnation by a day, and pleaded the Statute of 27 H. 6. This Bond is void at Common Law.

Its void also for Extortion, because of the unreasonable sum, &c. and the Statute doth not extend to such a Bond, 1 Keb. 872, 873. *Randall and Keite*.

The Condition was to appear before the Justices de B. R. at Westminster, and saith not *ad placita coram Nobis tenenda ubicunque, &c.* the Variance is not material, and by common Intendment it is the same Court, Sir Tho. Jones 46. Kirby and Curwin.

As to Sureties.

The Statute saith, That he shall take Obligation with sufficient Sureties; but this is for the benefit of the Sheriff, that is, for his Indemnity, that if he be amerced for Non-appearance of the party, he shall have his remedy; for he may take what Sureties he thinks fitting, *Mo. 636. Cotton and Vale*.

Therefore if the Sheriff take Obligation for Appearance, its not void *per Stat. 23 H. 6.* for insufficiency of the Sureties; or that the Surety had no Land; for the Sheriff may take one Surety or two, 2 *Andersf. 157.*

The Sheriff is Judge of the Sufficiency, and its no plea to say, he took Bonds of Insufficient persons, *Mo. Rep. 118. Cotton and Vale.*

The party that gives the Bond must be in the Ward of the Sheriff. So is *Beaufage's Case*, *vid. 10 Rep. 99. b. Winch. p. 20, 50. Empson and Batburst.*

The Bond
must be
taken of
the person
who is in
Lawful
Custody.

So, Condition to Appear; the Defendant on Oyer pleads the Statute of 23 H. 6. that the Plaintiff (Bayliff of St Edmondsbury) Imprisoned the Defendant without Warrant, and thereon took the Bond. *Per Cur*, Its an ill Plea; for the Bond must be taken of the person in Custody, i.e. Lawful Custody; and this Bond is voidable by Durels at Common Law, 3 Keb. 756, 760. Lord Suffolk and Birket, Sir Thomas Jones 76. *mesme* Case.

The Sheriff upon a *Fieri fac* took Bond of the Defendant to pay the Money in Court at the Return of the Writ; this is good, and not void by Stat. 23 H. 6. Vid. Dalton 443. 10 Rep. 99. *Beaufage's* Case.

Colore Officii.

What it is,
and to what
it extends,
or not.

Colore Officii is taken in *malam partem*. No Sheriff shall take Obligation contrary to the Statute *Colore Officii*. As one in Execution escapes and is retaken, and then a Bond is made for his Enlargement, this is *Colore Officii*. But if a Sheriff take a Bond for a true Debt; this is good, because its not *Colore Officii*, 2 Leon. 118. *Philips and Stone*.

Debt on Obligation taken by the Plaintiff Sheriff, of the Defendant his Clerk, upon Condition to pay the King's silver into the Exchequer within fourteen days after he received it. The Defendant pleads Stat. 23 H. 6. and averred it was taken *Colore Officii*. And upon Demurrer it was adjudged for the Plaintiff; for the Statute doth not intend such Obligation taken of them which are not to appear, nor in Custody. The Plea that the Bond is taken *Colore Officii*, will not avoid a Bond taken of the party, to do what he ought,

ought, *Mo. n. 685. Cartwright and Dalerworth,*
3 *Keb. 790.*

A Bond for Tuition of a Child as Curator, Curator.
and to give Account to the Ordinary, is but a Tutor.
voluntary undertaking of the Guardian, and so
not within the *Stat. 23 H. 6.* and its good at
Common Law, notwithstanding 3 *Inst. 149.*
3 *Keb. 671.*

Note, If the one part of the Condition be The whole
according to the Statute, and the other not, all Bond is
shall be void; for the Statute extends to the void, if
whole Bond, *Dive and Manningham PL 68. b.* against this
Palmer Rep. 378. Noel and Cooper. Statute in
any point.

If the Sheriff take Bond for a Point against
this Law, and also for a due Debt, the whole
Bond is void, *Hob. p. 14.*

Note, The Warden of the Fleet, and the Kings
Palace at *Westminster*, are excepted out of this
Act.

Of Pleadings.

Regula, This is a particular private Law, and Regula.
ought to be pleaded.

Condition was, That J. S. appeared in B. R.
&c. The Defendant demands Oyer, and so de-
murred; because it is not taken by the Sheriff
in the name of his Office. *Sed non allocatur*; the
Statute being not pleaded, (as *Whelpdale's Case*)
No Exception can be taken against it, for it may
be a just Debt, 1 *Sand. 155. Dive and Manning-*
ham's Case, Parker and Wells, Siderfin 24. Allen
and Robinson, Hob. 13. contr. 3 Keb. 320, 361. Oakes
and Ceel.

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*At etiam
Billæ.*

Demursi.

A Condition to appear in *B. R.* according to Custom, at the Suit of *M.* On *Oyer* the Defendant pleads there is no such Custom in *B. R.* as the Plaintiff hath alledged, to appear to an *etiam billæ*, and so the Obligation void. The Plaintiff demurrs, and Judgment *pro Querente*; because the Statute of 23 *H. 6.* is not pleaded, being a particular Law. But it might be pleaded, the Bond was by Duress, being in another manner than the Statute allows; and that Statute makes the Bond void for the whole, 2 *Keb.* 620. 3 *Keb.* 60, 181. *Forth and Walker.*

If the Statute be misrecited, it may be Demurred to, *Siderfin* 356. *Halbay and Bray*, 2 *Keb.* 278. *Pench and Woodnoth*,

Quare, How the Court will take notice of it, by the printed Book or by the Record, or otherwise?

Regulâ.

Regula, To plead an Appearance, and not to say, Prout patet per Recordum, is naught.

So *Corbet's Case*; On the Sheriffs Bond it must be averred a Record in the Rejoinder as well as in the Bar, 1 *Brownl.* 91. *Andrews and Robins*, *Cro.El.* 466. *Corbet's Case*, 2 *Keb.* 250, 278. *Knights and Pist.*

Condition was, If he appeared at *Westminster* such a day, to answer, &c. The Defendant pleads, that before the Day of the Return of the Writ the Term was adjourned to *Hartford*, and that there he appeared. The Plaintiff demurs. *Per Cur⁹*, He ought to conclude his Plea, prout patet per Recordum; for tho' he appeareth, yet if his Appearance be not entred of Record, he forfeits his Obligation, and he ought to Conclude his Plea so, otherwise the Plaintiff cannot answer thereunto as to say *Nul tiel Record*, *Cro. El.* 466. *Corbet and Cooke.*

Debt

Debt upon a Sheriff's Bond for Appearance in B.R. the Defendant pleads *comparuit ad diem*; the Plaintiff denies it, and by *Mittimus* out of the Chancery it was brought into the Common Pleas, and Judgment there given, *Palmer and Steward* cited *Cro. Car. 297. in Lutterel and Lees's Case*.

Tho' the Bond is made void by Act of Parliament, yet the party may not plead *Non est factum* not to be pleaded, but must plead the Special Matter, and take advantage of the Act of Parliament, 5 Rep. 117. *Whelpdale's Case*.

In Debt upon Bond, the Defendant pleads the Statute of 23 H. 6. and shews that *W.* was in Execution, and that the Bond was made for his Deliverance against the Statute. The Plaintiff Replies, That *tempore confessionis* of the said Bond *W.* was at Large; *absque hoc* that he was in Prison *tempore confessionis*, &c. the Traverse is not good: For one may be in Prison, and make a promise to make a Bond, for which he is Enlarged, and within an Hour after he makes the Bond, the same is within the Statute; it ought to have been *absque hoc*, that it was made *pro liberatione*, 2 Leon. 107. *Bowes and Vernon*, 2 Keb. 512. *Dis and Adams*.

Debt on Bond, dated 25 Sept. the Defendant pleads a *Capias ad satisfaciend* was awarded against *B.* who was taken on it the 30th of Sept. and that the Obligation was made for the Enlargement of *B.* The Plaintiff demurs, and had Judgment; because it appears the Bond was made before the Arrest, and so could not be avoided by 23 H. 6. but he ought to have pleaded it with a *primo deliberat* after the Arrest, *Noy 23. Collins and Phillips*.

Plea, That
before the
day of
Appear-
ance he
was taken
by a Cap'
Uilagat'.

To Debt on Bail Bond to Appear, the Defendant pleads before the 'day he was taken by *Capias Uilagat'*, and detained till after the day, and so could not appear. The Plaintiff demurred, and it was Adjudged to be an ill Plea; for the party may remove himself by *Habeas corpus*, and if this should be good, all Bail Bonds may be thus avoided, and the Plaintiff doth but his Duty, 2 Keb. 162. *Jeffreys and Cooper*, *Siderfin* 406. id. Case.

Rejoinder.

In Debt, the Defendant pleaded the Statute of 23 H. 6. and that was for ease and favour, and not for a just Debt. The Plaintiff Replies, It was for a just Debt, *absque hoc* that it was for ease and favour. To which the Defendant Rejoyns specially, and the Rejoinder was set aside in the Vacation by Judge Rainsford; and the Plaintiff entred Judgment for not joyning on the Issue tendred by the Plaintiff: And *per Cur'* the Judgment was affirmed, 2 Keb. 554. *Berry and Bishop*.

Regula.

Regula, For when an Issue and Rule is given, the other party must joyn, and cannot depart to any new matter.

Traverse.
Time of
the deli-
very of the
Bond.

A Sheriff brought Debt on a Bond, dated the 13th of Jun. the Defendant demands Oyer on the Condition, which was, That if he appear *Veneris prox' post tres Trin'*, and pleads, That *Veneris prox' post Trin.* was 14 Junii, and that he was Imprisoned by the Plaintiff till the 19th of June, and that the Obligation *supra fuit primo deliberas'* by the Defendant the 19th of June; *absque hoc*, that this was delivered as his Deed before the 19th day of June, *Siderfin* p. 300. *Courtney and Phelps*, 2 Keb. p. 108, 109, 122. *mesme* Case.

Per

Per Cur', This is not a good Traverse; it ought to have been, *absque hoc* that it was delivered as his Deed before *die Veneris prox' post tres Trin'*. For if the Traverse *supra* be allowed, the Plaintiff shall be excluded from answering to the Time alledged of the Return, altho' it be false.

The Defendant pleads *Stat. 23 H. 6.* and that ^{Traverse.} he was in Custody by warrant of a Writ Re- ^{Time of} ^{the Return.} *torned Veneris post Octab. Purificat'*. The Plaintiff Replied, The Defendant was taken by a Warrant on a Writ Returned *Sabbat' post Octab' Purific'*, and not by any Writ Returned *Veneris, &c.* The Defendant Rejoyned, That he was in Custody by virtue of a Writ Returned *Veneris post Octab' Purific'*, *absque hoc* that he was taken by any Writ Returned *Sabbat' post Octab'*. The Plaintiff demurrs. *Per Cur'*, This is no Traverse upon a Traverse; and there would be no Traverse in the Replication, which would make an end; but in the Rejoinder it doth, 2 *Keb.* 94, 105. *Bennet and Philkins*, 1 *Sand.* p. 20. *mesme Case*, 3 *Keb.* 656. *Gold and Cutler*, 191. *Sturges*.

Debt on Bond; the Writ was, *Ad respondend'* *H. G. nuper Vic' Norf.* and the Count was, *Qd' concessit se teneri p'fati J. H. in p'radiis 40 l.* and saith not, *Tunc Vic' Norfolc' existen'*. And *per Cur'*, *Sur Demurr'* upon the Bar it was Adjudged, *que Count fuit insufficient*, *Cro. El.* 800. *Guyben and Whicbftcomb*, 3 *Keb.* 191. *Twisleton and Dunken*.

J. S. puts himself in a Special Bayliff, and ^{Special} Arrests *J. D.* and takes Bond, &c. This is by ^{Bayliff} ^{takes} ^{Bond.} *Durefs*, and the Defendant may plead that; yet its not within the Statute, nor aided by it. ^{It is by} ^{Durefs.} For *J. D.* was never in the Sheriffs Custody after the Arrest, and the Bond was taken out of the County where he was Arrested, and so by *Durefs*,

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Duresh, Cro. El. 746. *Brown and Adams*, 3 Keb. 756, 760. *Earl of Bristol and Lord Burkin*.

After the Writ purchased, and before the delivery of it to the Sheriff, he may take Security.

The Defendant pleads to the Sheriffs Bond, that there was no Writ ever delivered to the Sheriff, and so would avoid it by *Stat. 23 H. 6.* The Sheriff after the Writ sent out, but before the Delivery, takes Security: Which *per Cur'*, he may, if the Defendant will give it, 1 *Keb. 554. Bromfield and Penbay.*

What Appearance to a Sheriff's Bond is good, &c.

Appearance after the Day is good.

If Appearance be the same Term, it is good. The Defendant pleads to a Sheriffs Bonds, taken for his Appearance in *B. R. die Sabbat' prox' post Octab' Sancti Martini*, and that he appeared at the day: And the Court of Common-Pleas gave him a Day to bring the Record of his Appearance by *Mittimus* out of the Chancery. And the Record was certified, that he appeared *Lunæ prox' post Quindena Martini*, which was after the Day, and adjudged good, 1 *Brownl. 58. Statfield and Grony*, *Idem* 74. *Carter and Freeman*.

So in *Daly and Fryar's Case*: The parties Appeared two days after the Day in the Condition, is good, and shall be a discharge of the Bond; for the whole Term is but one day in Law. So it is in the Common Pleas, and in the Kings-Bench, 2 *Bulfr. 253. Daly and Fryar*.

Defendant ought to Appear notwithstanding a *Superfedeas*

A Debtor having given Bond to the Sheriff to Appear, tho' a *Superfedeas* comes to the Sheriff before the day of Appearance; yet he shall appear to take his Bond.

A Sheriff sues his Bail Bond for Non-^{Plea of} appearance: The Defendant pleads *Comperuit ad diem*. The Plaintiff Replies, *Nul tiel Record* ^{ad diem,} *comparentia.* The Defendant Rejoyns, *Quod* ^{how lisse} *habeatur tale Recordum.* Now the Proof lies on the Defendants part, to produce the Record in ^{to be joyn-} Court. ^{ed, and on} ^{whose part} ^{the Proof} ^{lies.}

A Condition to Appear in B. R. where the Process is Retornable, &c. The Defendant said *in facto* that he had appeared *secundum formam*, ^{Appearance} *&c. Et hoc petit* Repleader was awarded; for ^{to be tryed} it must be tryed by the Record. ^{dum.}

A. is bound to Appear such a day, &c. and A. ^{How the} at the said Day goes to the Court; but there no ^{party may} Process is Retorned. Then the party may go to ^{Enter his} one of the Chief Clerks of the Court, and pray ^{appearance.} him to take a Note of his Appearance. ^{No Process} *Vide the* ^{is Retorned.} Form of the Entry in such case, 1 Leon. p. 90. *Brett and Shepard.*

If the other party plead *Nul tiel Record*, it behoveth that the Defendant hath the Record ready at his peril: For the Court of Common Pleas cannot Write to the Justices of the Kings-Bench, to certifie a Record thither.

Of the Sheriffs Retorn upon taking Bail, and of his taking Insufficient Bail; or his refusing sufficient Bail, and the Remedy: And his pleading in an Action brought against him.

Note, After the Statute of 23 H. 6. the Sheriff cannot make a Special Retorn in a *Capias*; but only a *Cepi Corpus* or *Non est inventus*: And the Statute, tho' it compells him to take Bail, yet it does not alter the Retorn. The design of the Statute is to provide against the Extortion of Sheriffs, being obliged to Retorn *Cepi & paratum habeo*, and yet to lett the Defendant at large; and

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and therefore there is no reason he should be Charged for not having the Body at the Day.

The Return of a *Paratum habeo*, is in effect no more than that he hath the Body ready to bring into Court, when the Court shall Command him.

And for his False Return of *Paratum habeo*, he is amerceable to the Court till he do bring in the Body, (and the Common Practice is so); but that is nothing to the party, and no Action lies against him by the party. And therefore *vide Page and Tulse's Case*.

Now, as to the Sheriffs taking Insufficient bail,
and refusing to take Sufficient bail, the Law
stands thus:

If the Sheriff refuse to take Reasonable Bail, an Action on the Case lies against him, *Siderfin p. 23*.

If the Sheriff refuse to take Bail, he is liable to an Action of False Imprisonment.

If the Sheriff take Insufficient Bail, yet no Action lies against him by the party; for he is Judge of the Bail. *Vide supra*. Therefore,

In Action on the Case against the Sheriff for Escape. The Defendant pleads the Statute of 23 H. 6. that he Lett H. to Bail; and took Reasonable Sureties A. and B. persons having sufficient within the County. The Plaintiff Replies, *Abſque hoc*; that he took Bail, having sufficient within the County. The Defendant Demurs; and Judgment *pro Defendente*; *Mod. Rep. 227. Ellis and Tarborough*.

Sheriff
pleads
Stat. 13 H.
6.

Where Trespass on the Case was brought against the Sheriffs of *Middlesex* for suffering an Escape and Retorning *Cepi corpus*, and *Paratum habeo*;

babeo (which was false.) The Defendants plead, That the party Arrested put in *J. B.* and *J. C.* Sureties, and plead the Statute of 23 *H. 6.* and they took Bond according to the Statute, and so let him Escape. *Per Cur.* The Plea is good, for the Reasons aforesaid. So in *Bowles and Lassell's Case*, if the Sheriff Return a *Languidus in Prisona*, having taken Bail *secundum Stat.*; it was adjudged, that tho' the Defendant was at Large, yet no Action lay against the Sheriff. All this must be understood of *Mean process*; for else this would be to frustrate the Statute of 23 *H. 6.* *Cro. El. 852. Bowles and Lassell.*

But Note, Then it must appear to the Court on the Record, that it is on the Statute of 23 *H. 6.* and not a Return at Common Law: And the Sheriff may in such case plead *Not Guilty*, *Siderfin 22 Allen and Robinson.*

But if the Sheriff demurs to the Declaration, If the Sheriff demurr, then the Action is against him. For the Declaration shall be taken to be true upon the Demurrer. *al' Narr.* For the Statute is private, and the Court will the Action is against him. not take notice of it unless it be pleaded. But him. if the Defendant had pleaded this specially, or if he had pleaded *Non culp.*, he might have had advantage of the Statute, and ousted the Plaintiff of his Action, *Cro. El. 624 Barton and Aldworth, Siderf. Parker and Welby, Mod. Rep. 244. 244. Page and Tulse, p. 33. Franklyn and Andrews, Mo. n. 427. Cro. El. 460. Gardner and Langton.*

By these Words in the Statute, *That if the Sheriff Return a Capi Corpus, he shall be chargeable to have the Body at the Day of the Return, &c.* it is intended only that he may be Amerced to the King for not having the Body at the Day; *2 Sand. 60. Postern and Hanson.*

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An Action on the Case against the Sheriff for not taking Reasonable Sureties, not having sufficient Estates in the said County, and Retorning *Cepi corpus*, and yet not having the Bodies ready by the day, lies not; for he is compellable to lett to Bail, and if he have not the Body he shall be amerced; And because he shall be amerced, the Statute gives him Advice to take sufficient Sureties, for his own Indemnity, 2 *Sand.* 59. *Postern and Hanson.*

Sheriff
pleads, *He*
had taken
sufficient
Bail, he
need not
say where,
nor Tra-
verse the
Intent.

In Action on the Case for taking Insufficient bail: The Defendant pleads, he had taken sufficient Security. He need not say where, nor need he traverse the Intent, to deceive the Plaintiff of his Debt: For it is not issuable at what place the Security was taken, and therefore need not be shewed; and the Intent is not Traversable; and had the Defendant pleaded so it had been ill, *Siderfin* 96. *Bentley and Hore.*

How the
Sheriff is
to plead on
23 *H. 6.*
c. 10.

Action on the Case against a Sheriff for taking Insufficient bail. The Defendant pleads the Statute of 23 *H. 6.* c. 10. The Plaintiff Demurs to the Bar, because the Sheriff had not alledged, that he had not dismissed one *B.* (whom he had taken) by sufficient Mainperners, but only alledgeth this by way of Implication, and not positively, 2 *Sand.* 58. *Postern and Hanson.*

Of Bail Bonds, being Discharged or Assigned.

Where the
Bail Bond
shall be
discharged,
paying the
Amercia-
ments, and
where not.

In Debt on Sheriffs Bond, the Principal being in Prison may be admitted to plead, discharging the Amerciaments (and this is the course of the Court) where the Prosecution is fresh: But where the Defendant in the Original Action, (*viz.*) the Principal is become insolvent. *Per Cur⁹,*

Cur, The Bail Bond is the only remedy, and they will not discharge that on Ordinary Rules. In this Case *North* prayed the Continuance of Process on the Bail Bond, in regard since the default of the Appearance of *Fludd* the Principal, he is become Insolvent by suffering several Judgments. But *Jones* said, That the Bail appeared on the very day of the Return, and the default is the Plaintiffs own, and the Bond not above an year old. And *per Cur*, paying the Amerciaments and Costs, the Bail were discharged, and the Principal admitted to plead, 2 *Keb.* 545, 553. *Fludd and Williams.*

The Surety paid the Debt, and he sued the Bail Bond assigned by the Sheriff; on which a Writ being directed to the Coroners, they took a New Bond and assigned it, and they prayed the Money out of the Coroners hands for the Surety. *Per Cur*, The Coroner cannot discharge his Bail Bond no more than the Sheriff, and they ordered the Principal Debt to be paid, 2 *Keb.* 287, 400. *Foster's Case.*

A Bail Bond was discharged upon Motion, the Money being paid before the Return of the Writ, and Common Appearance ordered, 3 *Keb.* 356. *Randall's Case.*

If the Defendant appears not to the Sheriffs Bond, according to the Condition thereof, the Plaintiff may (by leave of the Sheriff) sue the Bond in the Sheriffs Name; but its at the Plaintiffs Election to sue the Sheriff: And the Sheriff shall be amerced till he assign the Obligation to the Plaintiff, *Pract. Reg.* 24. *Siderfin.* p. 24.

When Bail is put in *de bene esse*, (as Bail taken in a Chamber) the Plaintiff cannot sue the Sheriffs Bond till it be refused or set aside; but he

Bail Bond
sued by the
Surety who
paid the
Debt, and
the Coro-
ners took a
New Bond.

Discharged
by payment
of the Mo-
ney before
the Return
of the Writ.
Assignment
of the Bail
Bond.

ought to except against it in the Judges Chamber, 1 *Keb.* 478.

Where the Sheriff shall be compelled to assign his Bail Bond.

The Court cannot compel a Sheriff to assign his Bond regularly. But in some Cases they will, as the party was arrested by the Sheriff, and through his default in not Retorning the Writ. The Defendant died. Now in this case, he shall not take advantage of his own wrong; but shall assign the bail Bond, or pay the utmost Amerciaments, 2 *Keb.* 388. *Hill and Brown-ing.*

Proceedings upon Bail Bond shall not be stayed until Special Bail given, where the Plaintiff had been prejudiced by delaying of Appearance.

It was moved in *B. R.* to stay Proceedings upon bail Bond, upon discharging the Amerciaments and Costs (as is usual.) And it was alledged on the other side, That after the same Bail given the Principal had sold his Land, and became irresponsibile, and rendred himself to the *Marshalsea*. And for this cause the Court refused to stay Proceedings, and said, it would not be done until he had given Special bail; because they did not cause him to appear at first, according to their Obligation. And so it is, when the Principal on such default of Appearance becomes a Bankrupt, *Siderfin pag.* 386.

Of other Bonds (beside Bail Bonds) Entred in to the Sheriff, what are good, and what not: And Pleading.

Vide infra tit. Bonds, between the High-sheriff and Under-sheriff, and others.

Bond to be a True Prisoner.

A Bond given to be a True Prisoner (as by Law he ought) is good, and not within the Statute of 23 *H.* 6. As to this,

There

There is a Notable Case of *Lentball and Cooke*.
The Case is,

Lentball the Marshal brings Debt on Bond
against *Cooke*. The Condition was,

If the above-bounden A. P. now Prisoner in
the Kings-Bench in *Southwark*, do and shall ^{The Con-}
from henceforth be and continue a true Pri-
soner, in the Custody, guard, and safe-keeping
of the above-named *John Lentball*, Marshal of
the same Prison; and in the Custody, guard and
safe-keeping of his Deputy Officers and Servants,
or some or one of them, until he shall be
lawfully discharged, without committing any
manner of Escape or Escapes during the time of
his Restraint, Then this present Obligation to
be void.

The Defendant pleads the *Statute* of 23 H. 6. Pleadings
of Obligations made to the Sheriff *colore Officii*.
And further pleads, That at the time, and long
before the Plaintiff was Marshal, that P. at the
same time was a Prisoner at the Suit of, &c.
And that the Defendant, together with the said
P. *pro easiamento & favore* to be shewed by the
Plaintiff to the said P. made the said Bond, &c.
The Plaintiff Replies, the Bond was *pro meliori*
securitate of the said Plaintiff, that the said P.
should not Escape, and traverleth the Ease and
Favour. The Defendant demurrs.

And these things were Resolved by the
Court.

1. That the Marshal of the Kings-Bench is
within the words, *Gaoler and Keeper of Pri-*
sons.

2. Bonds made to Gaolers for *Ease and Favour*
of Prisoners, are void.

Bond to
save harm-
less from
Escapes, is
void.

3. A Bond given to save harmless from *Escapes*, is within this *Statute* and void; but a Bond to continue a True Prisoner is good: And there is no agreement that it is for *Ease* and *Favour* appears, but the contrary rather; for the Plaintiff in his Replication hath Traversed it, and the Defendant hath confessed the Replication to be true by his Demurrer, 1 *Sand.* 162. *Lentball and Cooke*, *Latch.* 23, 143. *Elworthy and Perryer*, and *Hill* there cited.

This Case of *Lentball and Cooke* is Reported by *Siderfin*; and the Case there truly put as here.

Plea.

The Intention of the Obligation was for *Ease* and *Favour*, and Traversing it hath taken it away.

Demurrer.

Now when the Defendant had such Issue offered, and refused to joyn, but demurrs; the Defendant agreed it was for *Ease* and *Favour*, *Siderfin* 283.

Note, *A little Evidence in such case would serve to prove Ease and Favour.*

A Bond to the Warden of the *Fleet* to be a True Prisoner. The Defendant without pleading the Statute saith, it was for *Ease* and *Favour*. The Plaintiff demurrs. The Plaintiff should have Traversed the *Ease*. And Judgment for the Defendant, 3 *Keb.* 320, 361. *Oakes and Cell*.

Condition is, Where *D.F.* is under his Custody (*i. e.* of the Obligee) upon Arrest, at the Suit of the Plaintiff, in Action of Debt of 1400 *l.* upon Bond by him to the Plaintiff, and at the Request of the Defendant he is permitted to go at Large for six days. If therefore the said *D.* before the 12th of *February* renders himself a Prisoner

Prisoner to the Sheriff of *Middlesex* at the Plaintiffs Suit on Action of 1400 l. and remain a True Prisoner till he shall be discharged by Consent of the Plaintiff. See the Pleading. *Quere de Judgment, Sir Tho. Jones Rep. 139. Rushant and Waite, Siderfin 132.*

But a Bond of one in Execution to be a true Prisoner is within this Statute, and void. And as to this the Case was:

A Bond of one in Execution to be a True Prisoner, is void.

The Condition of the Bond was, If *Thomas Manningham* keep the Sheriff without damage against our Lord the King and one T. P. and at all times be at the Commandment of the said Sheriff as a True Prisoner, and appear before the Justices, &c. Then the Obligation to be void.

The Defendant pleaded the Statute of 23 H. 6. and that the Body of *Thomas Manningham* was in Execution upon a Recognizance, and that the Sheriff made the Obligation for the delivery of the said *Thomas Manningham*, and demanded Judgment *si Alitio, i. e.* If the Plaintiff ought to maintain his Action.

Conclusion of the Plea.

This is no good Conclusion of the Plea; he ought to have Concluded, *Issint nient son fait.* For the Statute saith it shall be void; and if it shall be void, then it shall be void from the beginning, and then it is not his Deed. And further, That he had not wisely Concluded his Plea; for this Special Conclusion had straitned the Defendant so, that if the Obligation be void for any other Cause, the Defendant shall not have benefit of it. And yet because it appear'd to the Judges on the Matter in Law, that the Plaintiff had no Cause of Action, the Court gave Judgment against him; for the Obligation is void by the Letter of the Statute, for it makes void Obligations taken in other manner, which extends to avoid Obligations for Bailing those

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which are contained in the second Branch ; as those in Execution, &c, *Plowd. 66, 67. Dive and Manningham.*

But as for the Conclusion of the Plea, the Condition was, That the Defendant should appear in B. R. to Answer in a Plea of Trespass, and satisfy the Damages. The Defendant pleads the Statute of 23 H. 6. [that the Bond was made for his Enlargement, and *Iffint non est factum.* The Plaintiff demurs Specially upon the Conclusion of the Plea, which ought to be Judgment *Si Actio*, and agreed the Plea to be ill, *Allen p. 85. Leech & Davies.*

Judgment
confessed
on Escape.

The Defendant and L. were jointly bound to Sir J. Lentball for the true Imprisonment of W. and there was a Warrant of Attorney to Confess Judgment on the Escape of W. Glyn moved to set aside the Judgment, being a way for Ease only, and Judgment entred without Trial of the Escape. But *per Cur'*, It is to be entred on Action brought, which is brought, and the parties are at Issue. But Sir J. Lentball assigned his Security to the Creditor, which *per Cur'*, is well enough ; and there appearing no Fraud, they refused to set aside the Judgment, 1 Keb. 815. *Sir John Lentball versus Lord Landois.*

The Rules
of the
Kings-
Bench.

The Marshal takes Bond of one in Execution to be a True Prisoner, who Escapes ; Action is brought against him, and well, for the Bond is good. The *Marshalsea* was Ruled to be enlarged, and this shall be called *Within the Rules* ; and if the Marshal take a Bond to tarry there, it is good, *Latch. 143. Sir G. Reynell versus Elworthy, Popb. 165. fine, Sir G. Reynel's Case.*

But

But a Bond to the Marshal, &c. to save harmless from Escapes, is void, and within the Statute; because it is not a Bond that he shall continue a True Prisoner. *Vide* the Condition, Record and Pleadings, 1 *Sand.* 160, 161, 162. *Leimbald and Cooke*, 2 *Keb.* 422. *Id. Casus.*

The Marshal ought not to take Bond for Chamber-Rent; this is to come in in Allowance Fees. The Warden, nor other Gaoler, cannot impose what Rents they will on Chambers, 3 *Keb.* 102. *Bond and Mosedale*, 3 *Keb.* 133, 603. *Duckenfield's Case.*

A Bond or Covenant for Fees is void; but a Bond for True Imprisonment is not void *prima facie*, without Circumstances, &c. 3 *Keb.* 133. *Mosedale and Middleton.*

A Bond for Chamber-Rent is void by Common Law; because the party is restrained *contra voluntatem*, and shall be Imprisoned till payment. Also the Statute extends to the Marshal only for such Bonds as they may take *virtute Officii*, *Latch.* 10. *Epsom Case.*

Upon a Statute acknowledged, and Extent sued, the Sheriff takes Bond of 20 *l.* for payment of 10 *l.* his Fee; and this was before the *Liberate*. Its a void Bond, 1. Because he takes the Bond before the *Liberate*. 2. He took his Wages before he did his work, 3 *Keb.* 678. *Ellis and Nelson.*

Vide infra tit. Fees.

Note, A Promise is within the Statute, as well Promise as a Bond. But it is where the Bond or Promise is made by the Prisoner himself, or some other for him. And therefore in an Action on the Case the Defendant promised the Plaintiff, That if *B.* (a Special Bayliff at his Nomination) arrested *A.* at his Suit on *Cap' ad satisfaciend'*, and

The Office and Duty of Sheriffs, &c.

and suffered him to Escape, he would not sue the Plaintiff; this is not within this Statute, 1 Leon. 132. *Palmer and Smalbrook*.

But *Hobart* in *Norton Sim's Case* saith, Covenant is not within this Statute; that is, because it was not a Bond (for performance) made in the behalf of a Prisoner, as *Beaufage's Case* is, *Hob. p. 13*.

As to *Assumpsits* and *Considerations* about delivering Prisoners in safe Custody, saving harmless from Escapes, permitting to go at large. *Vid. infra. Sub tit. Escape* in fine.

Where the
Sheriff is
not to take
60 or 40 *l.*
Bail.

By the Statute of 13 Car. 2. c. 2. persons arrested by Process out of the Kings-Bench, or Common Pleas, not expressing the Cause of Action in the Writ, Bill, or Process, and which areailable by the Statute of 23 H.6. c. 10. shall give Bail Bond, not exceeding the Sum of 40 *l.* and upon Appearance at the Return, he shall discharge such Bail Bonds. And if the Plaintiff do not Declare before the End of the next Term after Appearance, then he shall be Nonsuit, and Judgment and Costs shall be against him. But this Statute extends not to Arrests upon *Capias Utlagat*, Attachment or Rescous, Contempt or Priviledge; nor to popular Action, or Action on any Penal Law (except for Tythes) Indictment or Information.

Now if the Sheriff in such Personal Actions, do take a Bond of 150 *l.* (where it ought to be but 40 *l.*) the party shall have an Action upon the Statute against the Sheriff; but the Bond is not void. This was the Case of a Coroner, 2 Keb. 387, 311. *Foster and Closon*.

And

And therefore *Villars and Hasting's Case*, where it saith, The *Statute* doth not restrain him from any Sum, is good Law; but with this Caution, That Action lies against him if he exceed 40 *l. de placito debiti* generally, upon this late Statute, *Cro. Jac.* 286.

In what other Cases the Sheriff may Bail, or not.

The Sheriff cannot bail one Committed for Felony, except it be by the Kings special Writ directed to him for that purpose.

A man Indicted for Trespas, or any the like Offence, before Justices of the Peace, and thereupon Committed to Prison, may upon the Kings Writ be Bailed by the Sheriff to appear at Sessions.

Upon a *Superfedeas* the Sheriff may bail a man Sued, or Indicted, &c. whereupon a *Capias* or *Exigent* shall be awarded against him, and the party thereupon is Imprisoned.

C H A P. VIII.

Of Return of Writs, and when they may be Returned. General Rules and Maxims of Returns. What Writs must be Returned, and what need not. What shall be a good Return of Writs, or how Returns shall be made, in respect of the Person that makes the Return, as Sheriffs, Bayliffs of Franchises, &c. In respect of the Forms, and where insufficient Returns are aided. Where Returns shall be void for the Uncertainty or Repugnancy. What shall be a sufficient excuse for the Sheriffs Non-return of a Writ, and what not. What Acts, Process or Appearance shall be good before the Return. The Penalty on the Sheriff by the Court for Non-return.

A Return is but a Certificate made by the Sheriff or Bayliff to the Court, from whence the Writ issued, of that which they have done touching the Execution of the same Writs.

There is a difference between the *Teste* and Return of Writs.

A Return may be on the *Essoyn-day*. A Writ shall not abate if the Return be *quarto die post*.

If a man be bound to appear the first day in Term in Court, he may appear the first day of the *Essoyn*, and then have his Appearance recorded, and this is good, 2 *Bulst. Bedoe and Piper*.

Return
may be on
the *Essoyn*
Day.
Appear-
ance.

Note,

Note, Where the Writ or Process is directed to the Bishop, there the Bishop is to make Return thereof: And so where the Writ is directed to other Persons (as Coroners) they are to make Returns.

General Rules of Returns.

Deputies are allowed in Ministerial Offices: But all Returns made by them are to be made in the Name of the Principal Officer, 3 Bulst. 78.

The Sheriff must return true, and not contrary to the Record; if he do he falsifies all his Proceedings. L. brought Trespass against J. G. Widow, hanging the Suit, she takes D. to Husband; Judgment was against J. G. and a Writ was directed to the Sheriff, qd' caperet J. prædictam per nomen J. G. ad satisfaciend', &c. the Sheriff cannot now return that she was married. Crok. Jac. 323. Doley and White.

The Return must not be contrary to the former Return. If the Sheriff return upon the Venire fac' 12 Jurors, upon the Distingas he may not return one had nothing, for this is against his former return, 19 H. 6. 38. For if he had at first and alien since, yet it is chargeable with Issues. But if the Land be recovered by Eign Title, in the mean time he may return it with this Conclusion Et issint nihil habet. Id. ibidem. So if he had Land in the right of his Wife, and she is dead in the mean time.

The Sheriff is to put his Name to every Return made by him, or the Return is to be void. By the Statute of York 12 Ed. 2. c. 5. 1 Bulst. 73. The Statute appoints that he who Returns shall add his Name to the Return, and it is sufficient if it be his Christian Name and Sirname, and the name

Return of
Jurors.

name of his Office is not requisite, *Crok. Car.* 189. *Bethell and Parry. Plowd.* 63. tho' in *Scrog's Case, More* 548. saith the Name of Office must be subscribed, as well as by the Sheriffs Christian and Sirname, but by Coroners only the name of Office.

If the Sheriff arrest one upon Mean Process, and doth not Return the Writ, he is a Trespassor; and therefore *Stiles Pract. Reg.* 276. is not Law, where he saith it is not requisite that the Sheriff in making a Return should insert his Title or name of Dignity, or Christian or Sirname, but only his Name of Office. Before the Statute of *York, 12 Ed. 2. c. 5. Rast. Ret. of Sheriffs fol.* 345. no Name was used to be put to the Return of the Writ by the Sheriff, nor any other Minister or Officer which was inconvenient, upon which complaint was made to this Parliament, and so remedied.

The Return of the *Venire fac'* was *executio istius Brevis patet quodam pannello huic Brevi annex'* *Tho. H. nuper Vicecom'*, and then the now Sheriff added these words, *istud Breve sic indorsat' fuit mihi J. R. Vic' deliberat' per Tho. H. Mil' nuper Vic' in executione Officij sui*; it's sufficient, for *T. H.* ought to put his Name to the Return: For *nuper Vic'* shews he was not then Sheriff, he ought to have put his Name to it *T. H.* and then the new Sheriff ought to subscribe *istud Breve sic indorsat', &c. Plowd.* 63. § *Rep.* 41. 2 *Roll. Rep.* 209. *Bethers and Parry. Vide infra Cro. Car.* 289. *contra.*

Returns must be made according to the Ancient Course, and according to Presidents. As Wasse was assigned in *S.* the Return must not be *qd' accessit ad S.* but *ad locum vastatum*; *vide infra, 27 H. 8. Roll. 2. Dalt.* 162, 163.

So a Retorn of *non inveni partem* for *non est inventus*, it's Error and not amendable, 9 H. 6. fo. 12.

Mercer was outlawed at the suit of *H.* it was moved to avoid the Outlawry, because the Sheriff returned the Exigent on the back of the Writ thus, (*viz.*) *superdictus Mercer*, where it ought to be *infra nominatus Mercer*; for nothing was written above but within. But by all the Justices the Retorn was good. So if he had writ the Retorn on the inner side of the Writ. *Dals.* 164.

Surplusage is no hurt to the retorn of a Writ, as in *Elegit*, and the Sheriff returns that to be executed, the extent of the Church of *St. Andrews*, alias *dict^s St. Edes*, and the true name is *Andrews*, yet good. *Winch. p. 27.* In *Scire fac^t* returnable in *B.* If the Sheriff return *Scire fac^t &c. qd^o sit coram vobis ad faciend^o, qd^o Breve requirit*: Altho^o *vobis* had relation to the King, where the garnishment ought to be *coram Justiciariis*, yet good; for those words *ad faciend^o qd^o Breve requirit*, comprehend all. 29 Ed. 3. 33. adjudged every Retorn must exactly answer the Writ.

Statutes aid^o Misretorns and insufficient Retorns, but not where there is not any Retorn. *Cro. Car. 587. Becknam.*

None can make the Retorn of a Writ, but such a person, who at the time of the Retorn, remains an Officer to the Court. *Vide infra.*

Retorn of a Writ is not Traversable, *vide infra*: Or against the Retorn of the Sheriff, there is not any Traverse, Averment or Answer.

Per Maynard in Searl and Longs Case. Mod. Rep. 248. It's a great abuse in Officers to return such feigned name, the first cause of which was the ignorance of the Sheriffs, who being to make

Feigned
Retorns
mischie-
vous.

The Office and Duty of Sheriffs, &c.

make Retorns, and looking into the President Books for the Form, and finding *John Doe* and *Richard Roe* put for Examples, made their Retorns accordingly, and took no care for true Summoners and true Manucaptors. And he cited a Cause.

Judgment was entred in B. in a Plea of *Quare Impedit*, upon non-appearance to the Grand Distress; but there the Party was summoned and true Summoners retorned. Upon Non-appearance an Attachment issued, and real Summoners retorned upon that; but upon the Distress it was retorned that the Defendants *districti fuere per Bona & Catalla, & Manucapti per J. Doe & R. Roe*; and for that cause the Judgment was vacated.

Grand Distress.

Note. When the Grand Distress is awarded, it is, that the Sheriff is commanded to seise the thing in question.

Rule to the Sheriff to retorn his Writ.

If the Defendant be taken, then at the retorn of the Writ, the Plaintiffs Attorney at the day of the Retorn of the Writ, may give a Rule at the Clerk of the Rules, for the Sheriff to retorn his Writ; or if he go out of Office, then a *Distingas* to the new Sheriff to distrain the old Sheriff to retorn his Writ: But if the Defendant be arrested by a Bayliff of a Liberty, who hath the Execution and Retorn of Writs, then he must retorn his Warrant back to the Sheriff by Rule of Court, or *Distingas* directed to the Sheriff to distrain the Bayliff, and so amerce the Bayliff that way.

Of Retorns in respect of the Old Sheriffs and New Sheriffs.

Upon the Cap^t the Sheriff retorns *languidus* *Languidus in Prifona*, and a Distress issues to the new She- *in Prifona*,
riff to make the former Sheriff to have his Priso-
ner; and the new Sheriff retorns issues on the
former Sheriff, and an *alias Distringas* issues
against the Sheriff. And After one of the
Council would have furnished, that the Sheriff
against whom the Distress issued was dead.

What must
come in
way of
Retorn, and
not by way
of furnize.

But by the Court, He shall not have this by
way of Surnise, but it ought to come in by the
Retorn of the Sheriff. *Dier 25. a.*

The Retorn of the old Sheriff shall not
conclude the new Sheriff. On a *Fi' fa'* the She-
riff retorned *qd' cepit bona ad valentiam 10 l. &*
non invenit Emptores, whereupon there went out
to the new Sheriff a *vendition' exponas*, who re-
torned that his Predecessor *non cepit bona, & ideo,*
&c. and held good. 34. H. 6.

Where and what Writs need to be retorned, and
where, and what not.

Generally all Writs of Execution (except *Ele. Ca. fa. Ha-
git*) as Cap^t *ad satisfaciend'*, *Habere fac' seisinam*, *here fac.*
Habere fac' possessionem, *Fieri fac'*, *Liberate*, &c. *Seisin. Pos.*
which are the final Procefs, and after which no *seffionem,*
Judgment is given, nor no further Procefs; and *Fieri fac.*
when matters *en fait* are only to be done, as
Land to be delivered, *Seisin* had, Goods sold, &c.
are good, tho' the Writs be not Retorned or Fi-
led (if the Execution be duly made.)

Elegit must
be Return-
ed, and
why.

But in case of an *Elegit* otherwise, because the Extent is to be made by Inquisition, to the intent that the Court may judge of the sufficiency of it, and every Inquisition ought to be of Record.

Cap' in
Process
must be
Returned.

Capias in Process must be Returned, 4 Rep. 67. *Fullwoods* Case; in other cases the Party is at the end of his Suit; otherwise of a *Cap' in Process*, for the end of the Arrest is, that the Defendant shall appear. 5 Rep. *Hoes* Case.

In a *Scire fac'* for Execution, it's a good Bar that the Sheriff levied the Damages by *Fi' fac'* tho' he had not returned the Writ. *More* 468. *Hoes* Case.

Retorno
habendo.

The Writ of *Retorn' Habend'* is not returnable, 2 *Rol. Abr.* 434.

Habere
fac' seisinam.

The Sheriff was ordered to return an *Hab' fac' seisinam*, the Execution is good if he do not return it. But perhaps a *Writ of Error* in Parliament may be brought; and if he will not return it, the Court shall amerce him. 1 *Rol' Rep.* *God/all* and Sir C. *Heydon*.

Redisseisin,
Postdisseisin,
Admea-
sur' de
pastur',
Dower.

The Writs of *Redisseisin* and *Postdisseisin* are *Vicountiells*, and not Returnable; and the Sheriff shall hold the Plea, and give Judgment, 2 *Inst.* 82.

So the Writs of *Admeasurement of Pasture*, and of *Dower*, and the parties may thereupon plead before the Sheriff in the County. But these Pleas may be removed out of the County Court by *Pone*, 2 *Inst.* 369.

Duces te-
cum.

Where the Sheriff Returns *Cepi corpus & paratum habeo*, and brings him not in, then the Writ of *Duces tecum* shall be awarded, to have the Body in Court *sub pena*, 1 *Bulstr.* 82. *Gerton's* Case.

Scire fac' issues out of *Chancery* to the Sheriff of *H.* and the Justices of Peace, to call *L.* before them to take Security of the Peace. *L.* enters into a Recognizance, and the Sheriff Retorns; this Matter is not good, the Justices should have Retorned too. For the Viscount does not meddle with them as Sheriff, but by virtue of this Commission only, 21 *H. 7.* 20, & 21. 2 *Rolls Rep.* 257. *Leonard's Case.*

What shall be a good Retorn, or not; or how Retorns of Writs are to be made.

In respect of the persons that make, or ought to make the Retorn. As,

Sheriffs.
Bayliffs of Franchises.

Sheriffs.

If a Writ be directed to a place where there are two Sheriffs, as *London, Bristol, &c.* and one of them doth Retorn the Writ, its insufficient; for it must be Retorned in both their Names, tho' one (according to Custom) may execute it, 21 *Assize* 20. *Br. Officer* 22.

But if a Warrant be directed to two Bayliffs of a Franchise to execute a Writ, the Retorn of one of the Bayliffs in the Name of both is sufficient, *Tr. 39 El. Palmer and March.*

If a Writ directed to the Sheriff be executed, and after a new Sheriff is chosen, the new Sheriff ought to Retorn the Writ in this manner, (*scil.*) *Recepi hoc breve predecessori meo directum sic Indorsatum.*

How the new Sheriff ought to Retorn the Writ executed in the time of the old Sheriff.

So of a
Bayliff of
a Fran-
chise.

So if upon a Warrant directed to the Bayliff of a Franchise to Execute a Writ, it be served; and after and before the Return of it the Bayliff is removed, and a new Bayliff chosen, the Return to the Sheriff shall not be in the Name of the old Bayliff, but of the new Bayliff in the manner aforesaid; for the old Bayliff is now as a meer Stranger.

How, if it be
not execu-
ted in the
old Sheriff.

But if a Writ directed to the Sheriff is not Executed by him before he is removed, and another chosen, and after the Writ is Executed; this shall be Returned generally in the Name of the new Sheriff, without any mention of his Predecessor.

The same Law is of the Bayliff of a Franchise, *Trin. 39 Eliz. Palmer and Marsh.* If a Writ be Executed by one Sheriff, and before the Return of it a new Sheriff is chosen, he ought to Return the Writ, and not the old Sheriff, because the new Sheriff is now the Officer of the Court.

Maxim, None can make the Return of a Writ, but such a person, who at the time of the Return remains an Officer to the Court.

A Venire was Returned in this manner: *Per T.R. Vicecomitem. Istud breve cum pannello annexo mihi deliberat' fuit per Thomam Hanmer Militem, nuper Vicecomitem in exitu ab Officio suo. Et sic Indorsatur. Thomas Hanmer Miles, nuper Vicecomes.* It was assigned for Error, in that it appears it was Returned by one who had no Authority; for in saying *Nuper Vicecomes* excludes him, and that he was not Sheriff when he made the Return.

Per Cur', Its good; for it appears by the Record, that he was Sheriff next before *Thomas R.* and this word *Nuper Vicecomes* indeed doth necessarily

necessarily imply, that he was not then Sheriff at the time of the delivery of the Writ to the new Sheriff, then it must be construed, that by the word *nuper Vicecomes* he was Sheriff at the time of the Pannel made; and if he had Retorned it without the word *Nuper Vicecomes*, it had been good, *Cro. Car.* 189. *Betbyll and Parry.*

The Record is, that the *Venire fac'* to try the Issue was Retorned by *J.S.* Sheriff of the County of *D.* It was assigned for Error, that *J.S.* was not then Sheriff of the said County. And it was certified by a Record under the Seal of the *Exchequer*, (*viz.*) That he was Sheriff; upon which the Judgment was affirmed. But some are of Opinion, that this cannot be assigned for Error against the Record of the Court, *Mich.* 11 *Car.B.R. Smith and Smith.*

If the Writ be Retorned by one that was not Sheriff, its a manifest Error; but if the Defendant appear afterwards and plead, its not material; for his Appearance hath made it good, *Cro.El.* p.582. *Thoroughgood and Scroggs.*

If the Sheriff shall Retorn *Mandavi ballivo Libertatis*, and shall not therein set down the proper Name of the Bayliff, its not good.

The Sheriff cannot serve a Writ in part, and write to the Bayliff of a Liberty to execute the other part; as a Writ served as to part of the Jurors. But if the Sheriff upon a *Capias* in Debt against Three, Retorn that he had taken Two, and as to the other *Mandavis Ballivo Libertatis*, &c. good.

The common Form of *Vic' Ret'* is, *Feci quoddam Warrant'*; but to the Bayliff of a Liberty, *Mandavi*, &c. 2 *Roll.Rep.* 263.

Sheriff
cannot
Retorn,
He sum-
moned
himself.

Præcipe quod reddat was awarded *Vicecomitis Glouc', versus A. B. & C.* The Sheriffs Retorn, that the said C. was one of the Sheriffs of the said City. *Ideo ego præfat' C. &c. alter Vicecom' Civitat' prædict' meipsum secundum Exigentium brevis istius summonere non possum. Respons.* It was Adjudged a good Retorn, *Bendl. n. 160.*

The Retorn was in this Form, upon a Writ of Entry against *Edw. Mytchell, Thomas Wykes* and others.

Summ' infranominat' Edward' Mychell, R. Fenn & J. Denn, & quoad summ' prædict' Tho. Wykes, Justiciar' infrascripti Certifico qd' idem Thomas, & ego Tho. Wykes jam unus Vicecomis' Civitatis prædict', sum' unus & idem, & non alius neque diversi. Ideo ego præfat' Thomas & Hugo Hyde alter Vic' Civit' prædict' meipsum secundum Exigentiam brevis istius summ' non possumus. Respons. prædict' Thomæ Wykes & Hugonis Hyde Vic'. Anderson 110. n. 21.

Bayliffs of Franchises, vid. Suprà.

Retorn' de Vic' per Bayliff.

The Sheriff
cannot
Retorn a
Writ of
Inquiry,
&c. directed
to
himself to
be executed
by a Bayliff
of a Liberty.

If a Writ to enquire of Damages be directed to the Sheriff, he ought not to make such a Retorn, That he had Commanded such a Bayliff of such a Liberty, &c. *Cui executio prædict' brevis talis' restat fienda, & quod alibi infra Com' prædict' per se fieri non potuit, qui quidem Ballivus sic sibi responderet*; and so sets down an Inquisition before the Bayliff, and 40 l. damage. This Retorn is erroneous, untrue and against Law; because the Warrant was directed to the Sheriff himself to be Executed in any part of his Shire, and no *Venus* contained in this Inquest of Office, as there is in other Writs which Intitles the Bayliffs of Liberties. But because there were divers Presidents of
this

this Form, the Court would not Reverse it, *Hob. p.83. Virely and Gunstone.*

If the Sheriff Return, That the Bayliff of a Franchise (who had Return of Writs) had Returned, &c. this is good, altho' he doth not shew of what place he is Bayliff, 29 *Ed.3.c.1.*

W. had a *Cap' ad satisfac'* to the Sheriff of *Middlesex*, and makes Precept to the Bayliff of the Dutchy, and the Precept was *Ad capiend' H. ad respond'* W. where it should be *ad satisfaciend'*, and the Bayliff return the Precept served, and the Sheriff returns to the Court *Cepi corpus secundum Exigentiam brevis*; it was moved to have a new *Cap. ad satisfac'* against H. For tho' the Sheriff by his Return had Charged himself to the Plaintiff, so that he may demand Execution against him; yet where in truth the Defendant was never taken in Execution for the Debt, as here, but only taken *ad respondend'*, there the Plaintiff is at liberty to take new Process against the Defendant, which the Court granted, *Yelv. 52. Wood and Harborn.*

Presidents,

Mandavi ballivo qui nullum dedit responsum, 2 Sand. 99. Jaques and Cesar.

Mandavi ballivo upon Fieri facias, and upon *Non omittas* awarded. *Vic' rei' nulla bona*, 1 Sand. 305. Merchant and Driver.

The Form.

What Returns shall be good in respect of the Form, or not; and where Insufficient Returns are aided.

As to the Sheriffs setting his Name to the Return, *vide supra.*

The Office and Duty of Sheriff, &c.

Sometimes the Return is Insufficient for omission of Words: As where the Return was, *Residuum hujus brevis apparet in quadam Scheda*, for *Residuum executionis hujus brevis*, Fitzh. Ret. 14.

And the Sheriff is bound to take knowledge of the Law in making his Return; therefore in a *Scire facias* to L. B. Master of the Grammar School of S. &c, and to the Scholars of the same, he returned that *Scire fecit* to the Master, and doth not say, To L. B. Master, *Bro. Ret.* 88.

In a *Scire fac.* the Sheriff returned *Scire feci* A. B. modo & forma prout istud breve exigit & requirit, and said not *infra nominat* A. B. yet *per Cur'* its good, for these words *prout hoc breve exigit* are tantamount, 2 H. 4. 13. 3 H. 4. 9.

Return

Non inveni
is Error.

The Sheriff returned *Non inveni*, for *Non est inventus*, and the party thereupon was Outlaw'd. This was assigned for Error, and not amendable, *Fitzh.* 19.

A Return
in the 3d
person not
good.

A Return by the Sheriff in the Third person, is not a good Return. The Sheriff returned, *Quod præcepit ballivo de S. for Præcepi ballivo*, and he was amerced for it, 21 Aff. 17.

Rescous
returned.

The Sheriff upon a *Capias* returned, That he arrested the Defendant at S. and would have carried him to the Gaol, and A. B. rescued him. This Return was Insufficient, because he did not shew at what place A. B. made the Rescue; for it shall not be intended the place where the Arrest was, *Bro. Ret.* 97.

Vide plus tit. Rescous.

Prox' futur'
how
to refer.

The Teste of a Writ was 2 Martii 11 Eliz. The Return was, *In quarta Septimana Quadrigesima prox' futur'*. The words *prox' futur'* refer to *quarta Septimana*, not to *Quadrigesima*, Mo. 365. Barton and Lever.

In Trespass the Sheriff returned in the Common Bench, that the Defendant was attached *per catalla ad valentiam de 10 l.* Its a void Return, for he ought to return he was attached by one Beast or Chattel certain, and name them, that so they may be forfeited, *Cro. El. 13. Lawrence and Netherfole, 1 Anders. 51. vid. tit. Attachment.*

That the Defendant was attached per, &c. how to be returned.

In Outlawry of Murder the Sheriff returns, *Ad Comit' meum tenet apud D. en le County de Northumberland, and saith not in Comitatu meo Northumbrie tenet, &c.* Its Error, for one may be Sheriff of Cambridge and Huntingdon, and of Surrey and Sussex, 2 *Rolls Rep. 52. Alder's Case.*

Return in Outlawry.

Action of the Case upon Escape of one taken by *Ca. sa. ret' Pasche 16 Car. 2.* on a Judgment entred in *Mich. 16 Car. 2.* which is repugnant and impossible; and this moved in Arrest of Judgment on the return of a Writ of Enquiry. But the *Teste* appearing to be *Jan. 16 Car. 2. ret' Craft Ascens,* and that *Virtute brevis postea ante retorn,* (*viz.*) such a day of *May 16.* which should be *17. Per Cur,* This is a void Return, (*Viz.*) being expositive only, 2 *Keb. 101. Hammer and Unit.*

Time (*viz.*)

Where a Return shall be void for the Incertainty or Repugnancy, or not.

In a Replevin on the *Causam nobis significes,* if the Sheriff return, That the Beasts cannot be delivered, *quia visum inde habere non potuit.* This is not good, because he doth not say *accessit ad locum*; for perhaps he could not have the View, because he did not go where the Beasts were, 2 *Ed. 3. 54. b.*

In Replevin.

Outlawry

Uncertain
return of
the Exi-
gent.

*Prout sibi
constare
poterit*, is
ill in re-
turn.

Outlawry was reversed, because the Exigent had an uncertain Return, 2 Rep. Dr. Drury's Case, 141.

If a *Capias* comes to the Sheriff to take a man, its no Return that he was found within his Bailiwick after the delivery of the Writ *prout sibi constare poterit*. This is not good, but he ought to return expressly *Quod non est inventus*, 9 H.6.57.

So in a *Fieri fac' de bonis Testatoris* against Executors, if the Sheriff return that they have not any Goods in *balliva sua*, after the delivery of the Writ *prout ei constare poterit*. This Return is not good; for he ought to take notice whether they had Goods or not, and so return it, 9 H.57.b.

Return on
Assets.

But in Debt against an Executor, who pleads *plene Administravit*, and Assets are found upon a *Fieri fac'*, the Sheriff returns, that he had nothing within the same County; its a good Return, *Bendloes* n.91.

Uncertain.

Upon *Habere fac' seisinam* the Sheriff returns, that the party who ought to take the Seisin *non prosecutus est breve*. This is not good; for the uncertain Intendment of it, and the coming of the Sheriff to have seisin is not properly a prosecution of the Writ, *Pasch. 15 Jac. Floyd & Bethill*.

Repugnant

On Entry *sur disseisin* of two Acres, *Hab' fac' seisinam* was awarded. The Sheriff as to one Acre returns *Habere feci*, as to the other *Tardè*; the Sheriff shall be amerced for such a Return, as being contrary and repugnant in it self. As in *Ca. fa.* against two, the Sheriff returns as to one *Cepi*, and to the other *Tardè*, he shall be amerced, 2 Leon.175.

Vide Rescous.

What

What shall be a good Retorn against the Admittance of the party, or not.

Debt against the Heir: If the Defendant pleads, Nothing descends to him but an House ^{In Debt .} in B. upon which Judgment is given for the ^{against the} Plaintiff; *sed quia ignoratur* of what value the House was, a Writ issues to the Sheriff to enquire of the Value, and according to that to make Execution; and the Sheriff returns, That the Heir sold the House before the Writ came to him. This is not a good Retorn, *Hen.7 Jac. B.R. Goldson and Bennet.*

If in Action of Debt against Executors the Defendant acknowledgeth the Action, on which a ^{In Debt} *Fieri fac'* issues, the Sheriff may return ^{against an} *Nulla* ^{Executor.} *bona, &c.* for this stands with the Judgment, inasmuch as he confesseth the Action; but not, that he had Goods, 2 *Roll. Abr.* 459. *Newman and Babington.*

Upon *Habere fac' seisinam*, upon a Judgment against J. S. it is no good Retorn for the Sheriff to return, That J. S. had nothing in the Land, nor was Tenant, 17 *Ed.* 3. 66. b.

The Sheriff on *Levari Retorns*, That he had Sheriff Levied the said sum (which was 2000 l.) and in ^{pleads.} Debt he pleads as to 308 l. *Nil debet*, and as to the rest a Release from the Plaintiff; the Plaintiff demurrs. Now the Plea of *Nil debet* is ill, and the Sheriff is Estopped to plead it; for it is contrary to the Retorn. But *per Cur'*, since they have not relyed upon the Estoppel, but taken Issue, that could give them no advantage, *Hob.* 206. *Speake and Richards.*

What

*What shall excuse the Sheriff for his not Retorning,
and what shall not.*

As for the Sheriffs retorning a *Rescous*, Vide
sub tit. Rescous.

Resistance.

The Sheriff retorned a Resistance on *Habere fac' seisinam*, and he was amerced 20 Marks; because he did not take the *Posse Comitatus*, and an *Alias* awarded, *Hill. 19 Ed. 2. Execution 147.*

That none
came to
take Seisin.

On *Habere fac' seisinam*, its a good Retorn to excuse the Sheriff, that he at all times was ready to deliver *Seisin*, and appointed divers times in certain for the party to come to the Land to receive *Seisin*; but none comes for the party to receive it, 2 *Roll. Abr. 459. Floyd and Betbell.*

So he ought to excuse himself from the time before the day aforesaid, otherwise the Retorn is not good; for peradventure he was requested before, and would not perform it, *mesme Case.*

That he is
not paid
his Fees.

It is no good Retorn for the Sheriff to say, That the party will not pay his Fees, and therefore that he would not execute the Writ, 34 *H. 6. Bro. Ret. 10.* The very words of the Writ do enjoin the Sheriff to make retorn of it; and if he be not paid his Fees where he is allowed to take them, he may recover them by Action.

Tho' Inferi-
or Court
be not
bound to
allow a
Writ, yet
they must
make a
Retorn.

If a Writ out of the Kings-Bench be directed to an Inferiour Court, which the Inferior Court is not bound to allow, but may proceed notwithstanding the Writ directed to them; yet they ought to make a Retorn upon the Writ, and in the Retorn to shew the Cause: For the Writs from above ought to be obeyed, *Stiles Pract. Reg. tit. Retorn.*

Sheriff.

Sheriff returned a Protection on Arrest. It was set aside *per Cur³*, in regard the Sheriff cannot return a Protection on arrest. *Non est inventus*, or *Cepi corpus*, at his own peril; and its in his discretion to allow or disallow any Protection, and the Sheriff was ordered to return his Writ on a Pain, 2 *Keb.*

681. *The Sheriff of Yorkshire's Case.*

If a man be taken in Execution at the Suit of the King; afterwards a *Supersedeas* comes to the Sheriff, by 2 *H. 7. fo. 17.* he may return the *Supersedeas* with the Body. *If Supersedeas comes, he must return the Supersedeas with the Body.*

So the Sheriff is to return the *Capias* and the Body at the Day; but if the party discharge him, this is a good excuse, 3 *Bulstr.* 96, 97. *If the party discharge him, its a good Excuse.*

In Replevin, if the Sheriff returneth, That the Defendant claimeth Property, its a good Excuse, *Dalt.* 181. *a good Excuse.*

The Sheriffs of London may return their Custom, *Dalt. c. 73.*

Mandavi ballivo Libertatis, qui nullum dedit responsum, is a good Return to excuse.

Tardè is an Excuse.

So that the Plaintiff *non invenit plegios de proseguendo.*

Amendment.

Where Amendment shall be of Sheriffs Retorns, and where not.

On *Venire fac'* no Return was indorsed, nor any Name of the Sheriff on the back of the Writ, *nec quod executio brevis patet in quodam pannello, &c.*

The 18th of *Eliz.* aids Insufficient Retorns, not where there is no Retorns; and it could not be amended after Verdict, and a new *Venire fac'* issued, 5 *Rep.* 41. *Rowland's Case.*

The Office and Duty of Sheriffs, &c.

8 H.6. c. 12. extends to Retorns; but yet Imprison of Clerks are only to be amended. But it extends not to a Retorn by the Sheriff where it should be to a Coroner; nor doth 18 Eliz.

Nor to a Retorn of a *Venire fac'* without the Name of the Sheriff; *vid. plus Co.8 Rep.162. Blackmore's Case.*

The *Venire fac'*, and other Process, is directed *Vicecomitibus de Canterbury*, and the Retorn is made by one Sheriff only. The Court amended this at Common Law, and not upon the Statute of *Feofails*, as was *Sherington and Talbot's Case*, 1 Cro. . . . and 39 H.6.40. And they swore the Jury here, that there was but one Sheriff in *Canterbury*, *Siderfin* p.243. *the King and Perival.*

Album breve retorned is not amendable, *Mo. Rep.1196.*

Where the Retorn of the Sheriff shall be amended, as well after Verdict as before, *vid. 10 Rep. Denbaud's Case.*

Vide hic sparsim pluis de Amendments.

Having now Treated largely of the Insufficiency and Validity of Retorns in General, I shall consider how the Law is in Cases where Sheriffs retorn no Writs; or what Act, Process or Appearance shall be good before the Retorn, and the penalty on the Sheriff for not Retorning.

As to not retorning of *Execution*, *vide infra.*

Where a man is to lose an Inheritance if he do not appear, he shall appear without the Retorn of the Sheriff *gratis*, by Day in the Roll, 10 H.7. 11.

Where

Where a man is to have a Corporal pain if he doth not Appear, he may appear without the Retorn of the Sheriff *gratis*, *Id. ibid.*

In Trespass; if after the *Exigent* is issued, the Defendant renders himself and had a *Superse-deas*, he may appear by the Roll, altho' the Sheriff doth not retorn the *Exigent* at the Day, 38 *Ed. 3. 20. b.*

In a Writ of *Debt*, if no Original be returned, nor any Retorn made, yet the Defendant may appear by the Roll, 29 *Ed. 3. 18.*

In a Writ of *Debt*, if the Sheriff retorn the Original *Nihil*, &c. yet the Defendant may appear for fear of a *Capias*, 10 *Jac. B. R. Slattery and Vautre.*

The penalty for not Retorning.

Nota pro Regula by *Hales*: (1) The Court will discharge Prisoners on Common Bail in two Terms. (2) They will inflict Penalties on Sheriffs, for not making Deputies; and will (whether in Office or not) imprison them, for not retorning of Writs by the Day, and not leave them to Amerciaments, or *Distingas nuper Vice-comit*, 2 *Keb. 812.*

In 1 *Bulstr. 201, 202.* an *Habeas Corpus* was directed to the Warden of the *Fleet*, to bring in the Body of a Prisoner in his Custody; who refusing to make his Retorn, another Day was given him upon pain to return the Body.

If the Sheriff takes *J. S.* upon a *Latitat* or *Capias*, and doth not retorn the Writ, an Action lies against him.

C H A P. IX.

Remedy against the Sheriff for a False Return: Where and in what Cases, and what Action lies against him for a False Return. Where such Actions are to be brought, how to be laid, and the manner of declaring therein. Of the reason of the Return of Capi Corpus upon Bail taken. Where Action lies against the Sheriff or Bayliff of a Franchise, and which of them upon a False Return. Remedy against the Sheriff for not Returning the Writ; or against his Bayliff, or against the Bayliff of a Franchise. Of laying the Action; and of the Declaration thereon. Where, and in what Cases a man may traverse the Sheriff's Return or not.

FOR Remedy against Sheriffs, Bayliffs and Gaolers, and where the Action is to be laid as to Mis-feazance, Non-fezance, Faux-returns and Non-returns, vide Stat.VV.2.c.39.

For Mis-feazance,

1. For a Faux Return; where and in what Cases Action lies, and where not; and where and how such Actions are to be brought, and the manner of Declaring therein.

Summon-
ed.

In Partition, or other Real Action, if the Sheriff Return the Tenant summoned, when in truth he was not, Action of Deceit lies against him, 26 Aff. 48. 1 Brownl. 157.

So in a Real Action, if the Demandant deliver a Writ of Summons to the Sheriff, and the Sheriff summon the Tenant accordingly, and after does not return the Writ, Action on the Case lies against him, H. 32 El. B.R. Marsh and Astery.

So

So if the Sheriff retorn one Summoned or Proclaimed, which is not, Action on the Case lies; but this is not assignable for Error, *Mo. 349. Corbet and Marsh.*

Action on the Case lies against the Sheriff for retorning, That he had delivered to the Plaintiff, upon Inquisition taken where he refused to deliver it, and so the Retorn is false; tho' it was objected, that perhaps the possession is kept against him *manu forti*. But *per Cur'*, that is but mitigation of Damages; but his Retorn was false, and therefore the Action lieth, 1 *Roll. Abr. 738. Lister and Bromley.*

If the Sheriff retorn *Exigent 3 aut 4 exact'*, *Exigent.* and that there were not more Counties, where in truth there was a fifth County; the Plaintiff shall have Action on the Case against him, 9 *H. 6. 60. b.*

Sheriff arrests the party, and yet retorns *Non est inventus*; Action on the Case, or Trespass *Non est inventus* or False Imprisonment lies against him; for he is a Trespasser *ab initio*, *Cro. El. 729. Hawkin's Case. 18 Ed. 4. 18.*

Action on the Case was against the Sheriff, *Cepi corpus* for that he arrested *J. S.* and set him at large *on Stat. absque aliqua securitate inventa* for his Appearance, 23 *H. 6.* and at the Day retorned *Cepi corpus*, and that the said *J. S.* did not appear at the Day, but hid himself; and that upon an *Habeas corpus* awarded he retorned *Paratum habeo*, which was *Faux*, whereby the Plaintiff was delayed in his Suit, &c. The Defendant pleaded, That *J. S.* being arrested put him in Sureties for his Appearance, *J. N.* and *J. D.* who are persons of sufficient Estate within the County, and were bound to him in 40*l.* for the Appearance of *J. S.* at the Day in the Writ mentioned, and pleaded the Statute of 13 *H. 6. c. 10.* by reason whereof he let him

him at large, and traverseth *Absque hoc* that he let him at Large, *absque aliqua securitate inventa prout, &c.* Cro. El. 614. Barton and Aldworth.

The Court held the Plea and Traverse to be good; for he is by the Statute compellable to take Bail, and its left to his discretion what Bail to take: And altho' he had not the Body at the Day, and afterwards at the day of the *Habeas corpus* returned, *quod paratum habeo*, when he was at Large, that is a contempt to the Court and Fineable; but its nothing as to the party, nor can he take advantage of it.

Sheriff not charged in Action on the Case for retorning *Cepi corpus*, when he had bailed the party. 23 H. 6. 10. A General Law in some Cases.

So that the Law which has been disputed, is settled, That where the Sheriff takes Bail according to the Statute of 23 H. 6. and returns *Cepi corpus*; tho' the party do not appear at the Day, yet the Sheriff shall not be charged in an Action on the Case for a False Return, *Siderfin* p. 22, 23. *Allen and Robinson, Mo. n. 590. Langton and Gardner.*

For the Statute of 23 H. 6. is a General Statute, of which the Judges shall take notice; but if it does not appear to be a Return within the Statute, but at Common Law, there for his Non-appearance Action lies. And there is a Case in *Siderfin* on this Point which is worth observation, as to laying the Action and Pleading:

Action on the Case was brought for a False Return, *i.e. Cepi corpus*, and yet he had him not at the Day, but suffered him to escape. The Defendant demurs to the Declaration. Now the Action is good, because the Declaration shall be taken to be true upon this Demurrer. And the Statute of 23 H. 6. is in part a private Statute, and the Court will not take notice of it without pleading it. But had the Defendant pleaded it Specially, or had he pleaded Not Guilty, he might have had advantage of this Statute, and have

have ousted the Plaintiff of his Action. After the said Statute the Sheriff cannot make a Special Return, but *Cepi corpus*, or *Non est inventus*. So that the Case of *Allen and Robinson* as to that Point, is good Law. For such Action lies not properly against the Sheriff, because the Statute of 23 H.6. compels him to Bail the Prisoner; and yet the Sheriff shall return a *Cepi corpus*, as formerly, *Siderfin* p.439. *Parker and Welby*.

Now its said in *Benson and Welby's Case*, that 23 H.6. c. 10. is a private Statute, and ought to have been pleaded, 2 *Sand.* 154. *Benson and Welby*.

Now that Statute, as *Whelpdale's Case* is, is a private Law as to Sheriffs Bonds; but as to Extortious Fees, its a publick Law, 2 *Keb.* 626, 657. *Mod. rep.* 33. *mesme Case*.

If a Sheriff levy Money on a *Levari facias*, upon a Recognizance, at the Suit of *J. S.* and returns the Writ served, *J. S.* may have Debt against the Sheriff, or against the Sheriffs Executors. But in this Case the Plaintiff demurr'd to the Defendant's Plea, and Concluded ill. The Plea was grounded on a Release, and he should have demanded Judgment, if the Defendant should be admitted to plead a Release made after the Sheriff had made his Return, 1 *Rolls Abr.* 518. *Speake and Richards*, 1 *Brownl.* 57. *mesme Case*. *Hob.* p.206. *mesme Case*.

Action on the Case lies against a Sheriff, who accepts of a Return of one that is not Bayliff, and against him that made the Return, *Mo.* 431. *Palmer and Smalbate*.

Action on the Case lies against the Bayliff of a Franchise for negligent Execution, or a False Return, *Mo.* p.431.

Debt vers. Vic, if he levy the Money on *Levari*.

Action lies for accepting the Return of one that is not Bayliff. Against Bayliff of a Franchise.

For making other Retorn, than is returned by Bayliff of a Liberty. Where the Action lies against the Sheriff or Bayliff of a Franchise on a False Retorn.

Action on the Case lies against a Sheriff, for making other Retorn than is returned to him by a Liberty or Bayliff of a Franchise, who had *Retorna brevium*, 1 Roll. rep. 119.

Upon a *Fieri fac'* against an Administrator, the Sheriff makes a Warrant to the Bayliff of a Franchise to execute it, and after the Bayliff is removed, and another Bayliff elected; and after the old Bayliff returns in his own Name to the Sheriff, That the Administrator had not any Goods *præterquam*, &c. which is false, and after the Sheriff makes return accordingly to the Court; yet no Action on the Case for this False Return lies against the Bayliff. For the Return ought to have been made of the new Bayliff, and so the Sheriff had accepted a Return from one as it were a meer stranger, and so void. And he ought to take Cognizance of the right Ministers of Law; and therefore the old Bayliff for this False return is not punishable by the Law, but the Sheriff, 1 Roll. Abridgm. 99. Palmer and Marsh.

If the Sheriff return *Mandavi ballivo Liberatis*, &c. *qui mihi responsum dedit*, &c. if the Master of the Return be false, no Action lies against the Sheriff, but only against the Bayliff: For the Sheriff ought to accept the Return of the Bayliff, and not examine the reality of it, (if it be sufficient in Law) 1 Roll. Abr. 98, 99. Palmer and Marsh; Cro. El. 512. Palmer and Potter.

Against the Sheriff, for a Return by one who is not Bayliff of a Franchise. If a *Venire fac'* comes to the Sheriff in a *Quare impedit*, and the Sheriff command the Bayliff of the City of C. to return the Pannel, who does it accordingly, where he had not any Warrant to do it, not being Bayliff of a Franchise, whereby the Pannel is quasht. The Plaintiff for this default in the Sheriff, and for his Damages shall

shall have an Action on the Case, 38 Affize

13.

The Sheriff upon a *Fieri facias* against J. S. ^{Against} makes a Warrant to J. S. to execute as his Bayliff, ^{the Sheriff,} and he does it; and afterwards the Sheriff makes ^{and not} a False Return, (*viz.*) that the Writ came *Tar-* ^{against} *de, &c.* by which he is a Trespasser *ab initio*, yet ^{the Bay-} it makes not the Bayliff a Trespasser, 2 *Roll. Abr.* 562. *Parkes and Moss.*

It was the Opinion of all the Judges in the Case of *Fawcett and Cotton*, That the Sheriffs submission to a Fine, is no Conclusion to the parties grieved, to bring their Action for the false Return of the Sheriff, if it were so, *Sir Thomas Jones* p. 39.

In return on *Elegit*, the Sheriff Returns, That ^{Case, and} he had appraised the Goods *in specie* to 40 l. and ^{not Debt.} extended such Lands, and delivered them to the Plaintiff. *Ubi revera* he never delivered them to the Plaintiff. Action of Debt lies not in this Case, but Action on the Case; for it is no Debt in the hands of the Sheriff, *Cro. Jac.* 566. *Coryton against Thomas.*

And its not like to *Pyke's Case*, 14 *Jac.* which was, the Sheriff on a *Scire fac'* returned, That he had sold the Goods for so much Money, and delivered the Money to the Plaintiff; and the Plaintiff thereupon averring that he had not the Money, maintained an Action of Debt: For there the Sheriff confessed by his Return, That he had sold the Goods, and delivered the Money; but here it is not returned, that he meddled with the Goods, or the value of them, so as there is not any Certainty to charge him, *Pyke's Case*, 14 *Jac.*

Where the Action is to be brought.

* Action for a False Return may be brought in the County where this was, or in *Middlesex* where the Record is, *Cro. Jac.* 532. *Parkhurst and Powell.*

So Escape at *D.* in *Wales*, and the Return was *Non est Inventus*, and it was tryed at *Westminster*, the False Return being made at *Westminster*, which is the cause of the Action, 2 *Keb.* 362. *Mancer and Smith.*

If a Sheriff on *Cap' Utlagat'* will not arrest the party, but return *Non est Inventus*, an Action may be brought against him in the County where he received the Writ; or in *Middlesex*, where the Record of that False Return is, at Election, *Hob.* 209. *Siderfin* p. 218, 219. *Russell's Case.*

A Doubt was, Whether Action on the Case for a False return on *Elegit* lies in the County where the return of the *Exigent* was, *i. e.* in *Middlesex*, or where the Land lies? And the Court inclined, that it lay most properly in *Middlesex*, *Winch.* p. 100. *Shair against Sir Francis Glover.*

One brings Debt against *B.* Sheriff of the County Palatine of *Lancaster*, and sues him to Outlawry on *Mesn* Process, and had a *Capias* directed to the *Chancery* of the County Palatine, who make a Precept to the Coroners of the County, being Six, to take his Body and have him before the Justices of the Court of Common Bench at *Westminster*; one of the Coroners being in sight of him, and having a fair opportunity to arrest him does it not, but they all return *Non est inventus*. The Plaintiff hereupon brings his Action against the Coroners in *Middlesex*;

desex; And the Court inclined, that the Action is well brought in *Middlesex*; because the Plaintiffs Damages arise here, by not having the Body here at the Day, *Bulmer's Case Rep.* and *Dyer* 159.

The *Chancery* returns to the Court the same Coroner. Answer that the Coroners return to him, so that the False Return is the cause of prejudice, and the other things are but Arguments to prove it. And the Court conceived an Action would not lye against one Coroner, no more than against one Sheriff of *London, York, &c.* *Mod. Rep.* 198. *Naylor and Sharpley.*

Of Declarations in Actions for False Returns.

In *Pigor's Case* it was alledged for Error that the Declaration was naught:

1. The Bond was made for 200 *l.* dated 29 Aug. 13 Jac. and this was before the Bond made; yet being returnable in *Michaelmas* Term, and the *Latinas* upon it after the Bond, its sufficient to maintain the Action, and the Process always bears *Teste* the last day of the Term before. Process before the Bond made.

2. The Declaration is, The Sheriffs Bayliffs arrest the party, and the Sheriff falsly returned *Non est inventus*. It was alledged for Error, that the Declaration was not good, because he doth not shew that the Bayliffs delivered the Bond to the Sheriff, which they had taken for his Appearance; nor is it shewed that the Defendant did not appear. *Sed non allocatur*. For these serve but for aggravation of Damages, and are supplied by the Verdict, *Cro. Jac.* 561. *Pigor and Rogers.* Its not shewed the Defendant did not appear.

Action
against
the old
Sheriffs.

Fieri fac' for Debt was delivered to the Sheriffs of N. who executed it, after which the Sheriffs were discharged of their Office, and new ones elected. The old Sheriffs redeliver to the party his Goods taken in Execution, and indorse *Nulla bona* on the Writ of *Fieri fac'*, and deliver it to the new Sheriffs so Indorsed. And an Action on the Case was brought against the old Sheriffs for this False Return, and Judgment *pro Quer'*. And these Exceptions were taken:

1. The Plaintiff in his Declaration does not say, that the old Sheriffs did return *Nulla bona*, but only that they did indorse *Nulla bona*, which is no Return.

2. He saith not, they delivered this Writ thus indorsed to be returned, *i. e.* by Indenture.

Tho' it
appear not
that any
return of
the con-
trary was
made by
the old
Sheriffs.

3. It appears not whether any Return of the Writ were made by the old Sheriffs or the new. *Per Glyn* Chief Justice. He conceived it to be well, and according to the course in that kind. For the old Sheriffs to make the Return, and to deliver the Writ over by Indenture to the new Sheriffs, and here was a Verdict. And a Return is not properly a Return till it be filed here; yet it is the Return of the Sheriff in the County where he is Sheriff; and yet it seems Judgment was reversed. *Quere. Style p. 474. Toft and Day.*

Action on the Case on a False Return of *Non est inventus* by the Sheriff of *Galloway* in *Ireland*. It was averred, that the Sheriff at the time of the delivery of the *Capias* had the person in Custody at *Galloway* in the City of *Dublin*, and the Action is brought in the County of the City. *Per Sanders.* On a *Capias* delivered to the Sheriff out of the County, he is not bound to hold him there. So upon a *Latitat*, which is no Warrant

to

to the Sheriff, to take him but only in his Bailiwick. *Per Cur.* This may be by *Habeas corpus* or *Fresh Suit*, and being after Verdict, that finds the False return (for the return was *Non est inventus in balliva*) and the Jury find that he was *in balliva* at the return of the Writ, the Court will presume him legally in Custody, 3 *Keb.* 557, 561, 600. *Bradshaw and Andrews.*

Plaintiff declares, he had prosecuted a *Capias* against *Chapman*, who was indebted to the Plaintiff in 100 *l.* and delivered it to the Sheriff at *Newport P.* and that the Sheriff *postea & adtunc & ibidem potuisset arrestare* the said *Chapman*; but that the Defendant *machinans*, to delay the Plaintiff, &c. *arrestare* the said *Chapman*, &c. *adtunc & ibidem abstinuit & recusavit*, and had falsely returned *Non est inventus*. Defendant pleads *Non culp.* and Verdict *pro Quer.* *Per Cur.* After Verdict the Declaration is good enough; and tho' *potuisset arrestare*, without shewing how, or that the Defendant was in view of *Chapman*, and *potuisset* denotes a possibility; and this is true if he were in the County, and the Sheriff is not bound to attend his Office in every particular case; yet it shall be intended such Matter was given in Evidence, by which it appeared to the Jury, that the Sheriff *potuisset arrestare*, and the Declaration *quod recusavit* doth imply Opportunity: But it was agreed to be good Cause of Demurrer, *Sir Tho. Jones p.47. Fish versus Aston Sheriff of Bedford.*

Error brought by the Sheriff, upon a Judgment against him upon a Writ of *Scire fac.* for an ill Return of a *Fieri fac.*, 2 *Sand.* 338.

Actions against the Sheriff for Non-feasance.

For not retorning of Writs.

If a *Capias* issues against *J. S.* and the Sheriff doth not make any return upon the said Writ, he is a Trespasser *ab initio*, and false imprisonment lies against him. 16 H. 7. 14. 3 H. 7. 36. 21 H. 6. 5. 5 Rep. Hoes Case.

Before the Stat. *VV.* 2. 19. Regularly for not retorning a Writ the Sheriff was amerced *Quousq;*, &c. but for a False Return or imbesfilling the Writ, Action lay at Common Law. Co. 2 *Inst.* 451. *Rast. Entries* 501, 626. Presidents of Actions on this Statute. This Statute prevents the Return of a *Tarde*, i. e. *quod breve adeo tarde venit, quod preceptum Regis exequi non potuit.*

Cap. ult. gat.

It's a Question in Sir *William Clarks* Case if Action on the Case lies against a Sheriff for not retorning a *Cap. Utlegat.* It seems it does, for the Party has loss by not retorning the Writ, tho' the Queen may amerce him for his Contempt. *Cro. Eliz.* p. 873. Sir *Will. Clark.*

Summons.

Action on the Case lies against a Sheriff for not retorning a Summons. 1 *Leon.* 146. *Marsh and Astrey.*

Inferiour Court.

If a *Capias* be returned out of an Inferiour Court to an Officer of the Court to take *J. S.* and he took him accordingly, and does not return the Process, he is a Trespasser *ab initio*, for as much as he is the Officer that ought to return it, and he is a Sheriff within his jurisdiction. 2 *Roll. Abr.* 563. *Kirk and Atkins.*

Bayliff errand or Servant not to be punished for not retorning of the Sheriff.

If a *Capias* in Process be awarded to the Sheriff, and he makes his Warrant to a Bayliff-errant, who is a sworn and known Bayliff within the

the County to take him, and he does it accordingly, if the Sheriff does not afterwards return this Writ, it shall make him a *Trespasser ab initio*, because he is but the Sheriffs Servant, and for this he ought to be subject to the wrong done to the party as his Master is, 20 H. 7. 13. 21 H. 7. 22. M. 14. Car. B. R. *How and Stocken bar.* But if the Bayliff-errant, in that Case, return the Body and the Warrant to the Sheriff, altho' the Sheriff doth not return the Writ, yet he is excused. And if the Sheriff upon such Process makes special Bayliffs, and they take the Party, and the Sheriff doth not return the Writ; altho' there is not any default in the Bayliffs, yet they are *Trespassers ab initio*, because they are but Servants to the Sheriff and by his appointment; but this seems a sorry reason: And I take it *Girling and Allens Case* is good Law. For tho' the Sheriff ought to return his Writ, otherwise his Justification in False Imprisonment is not good; yet it is not so with his Servant, for he has no means to enforce the Sheriff to make return thereof; and if what he does is legal, it shall not be made illegal to him by the act or default of another. *Crok. Car. Gilling and Allen.*

11 Car. B. R.

Upon a *Capias* in Process, if the Sheriff makes his Warrant to a Bayliff of a *Franchise* to execute it, who does it accordingly, and makes return of the Body and Warrant to the Sheriff, and the Sheriff after does not return the Writ, yet this shall not make the Sheriff a *Trespasser ab initio*, because he had done his duty, and no default is in him; and he is the Officer of the Franchise, and not of the Sheriff. 8 Ed. 4. 17. b. 21 H. 7. 22.

The

Sheriff not
to file the
Retorn, de-
pending
Action on
the Case a-
gainst him.

The Court was moved, that the Sheriff may not be admitted to file the retorn of a Writ, because action on the Case was depending against him for not retorning it, because then the Action would abate, and it was granted by *Rolls. Stiles 408.*

Laying the Action and Declaration for not Retorning.

In a Writ of Entry *sur disseisin*, the Land lying in the County of *H.* if the Plaintiff deliver the Writ of Summons to the Sheriff of *H.* in *London*; and after the Sheriff summons the Defendant upon the Land, and after doth not retorn the Writ; for which Action on the Case is brought in *London*, where the Writ was delivered to him, and the Defendant pleads he did not summon him, &c. upon which they are at issue, this may be tried in *London.* 2 *Roll. Abr. 807. Rash and Astrey.*

Action on the Case against an Undersheriff, and declares, whereas the Plaintiff had brought a Writ of Entry against *H. C.* and delivered it to the Undersheriff to be executed in *forma Furis*, and gave him two shillings for the executing of it, and that at such a day he caused the said *H. C.* to be summoned, yet *falso*, &c. he did not retorn the Writ of Summons at the day of the retorn. *Cro. Eliz. 175. Marsh and Astrey. and p. 397. Collet and Marsh.*

It is not
averred
that the
Officer
continued
in his
Office.

It was moved in Arrest of Judgment, for that it is not averred he was Undersheriff, and continued in in his Office at the day of the Retorn; for otherwise the Action lies not against him, *sed non allocatur.* 1 *Lev. 146. Mesme Case.*

It

It shall be intended that he continued in his Office, for he was Undersheriff when the Writ was delivered to him; and 'tis alledged that he caused Summons to be made, and did not return it at the day, by which it shall be intended, that the Authority was in him. The Declaration was, that the said *Astrey* (Defendant) *intendens & machinans ipsum querentem in Actione sua prad' prosequend' impedire, &c.* did not return the Summons, but saith not *tunc existens* Undersheriff, yet it's good; and if the Defendant were not Undersheriff, the same shall come in of the other side.

Where a man may have a Traverse, or Aver against the Sheriffs Return, and where not.

It is commonly said in our Books, that no Averment shall be against the Sheriffs Return which is of Record, and therefore in a *Redisseisin* it cannot be assigned for Error that the Sheriff *non accessit ad tenementa*, as he hath returned, for that is against his Return, which is recorded. *Gaudy in Collet and Marshes Case. Leon. 183. Hollands Case.*

Gaudy in Collet and Marsh's Case, 1 Leon. 397: held, against any thing done or returned by a Sheriff, as an Officer, there may be an averment; as an averment against a Bishops Certificate; but the other Justices *contra*: For the Justices ought to credit the Officers. Error because the Defendant was not summoned in a *Præcipe quod reddat*, at the Church door, according to the *Stat. 31 Eliz. c. 3.* and by reason of the default a *grand cape* was awarded, and the Sheriff returned him summoned at the Church Door.

Action *sur*
Deceit,
but not on
an Aver-
ment.

Per Cur', he shall not have this Averment, but his Action of *Deceit* against the Sheriff, *Cro. Eliz.* 397. *Collet and Marsh's Case*, 10 *Cro. El.* 9, 10. *Clay's Case*. If in Partition the Sheriff Return, he was there in proper person, and this Return be received, and the Writ filed, then the Court cannot examine it; for the Return is good, and the party can have no Averment against the Return, nor Error. The Jury appeared on a Trial, and the Defendant would have challenged the Array *ore tenus*; because it was Returned by one S—— Sheriff, two days after he had received a Writ of *Discharge*. *Per Cur'*, He cannot Challenge it for that Cause; because it would be a direct Averment against the Record, for it was Returned by him as Sheriff, and the Return accepted, *Cro. El.* 369. *Hore and Broom*.

In the Lady *Russel and Wood's Case*, *Cro. El.* 780. the Kings-Bench would suffer a Traverse to a Sheriff's Return, because it is False. As 4 *El. Dyer* 412. and in the Common-Bench is usual, and Presidents ordered to be searched.

Sed distinguendum est. And I shall shew in what Cases one may aver against the Return of the Sheriff.

Matter
Collateral.

A man may aver against the Return of the Sheriff, if the Return be a matter Collateral.

As if the Sheriff upon a *Capias* return a *Rescous*, there may be an Averment against it, *Owen* 132.

In another
Action.

So *Winch. p.* 100. in another Action Averment may be against the Return of the Sheriff, tho' not in the same Action; as 5 *Ed. 4.* for False return. *Winch. p.* 100. *Stiles versus Sir Francis Glover*.

Return
concerns a
mans In-
heritance.

If the Return of the Sheriff concern my Inheritance, I shall have averment against it. 2 *Rolls Rep.* 54.

In a *Præcipe quod reddat*, at the Summons returned, he may say that his name is *T. B.* and that he was summoned by the name of *J. B.* because otherwise he shall lose his Land by default, 19 *H.6.10.b.*

If the Sheriff return a man outlawed of In Outlaw. Felony, he may aver against this Return, that *ry* for he came in at the *5th* County, and tendred Sure- Felony. ties, and so was Outlawed; for this is in case of Life and Member, 1 *Ed.3.24. b.*

On *Scire fac'* against the Tertenants, the Defendant after the Return of the Sheriff pleads, Tertenants that he is not Tertenant. The Plaintiff demurs; because, as *Cro.El.872. Blood's Case*, he is estopped by the Sheriffs Return. And in *Rastall's Entries*, Tertenancy is traversed: And 4 *El. Dyer 212.* the Return of a *Capias* is traversed as to Rescue. And *Cro.El.859.* its agreed, that Waste is tra- Waste. verable on the Return of the Sheriff. But *per Cur'* a general *Non tenure* by Lessee for years is pleadable; for else his possession would be disturbed by *Ejectment*, *Cro.El.872. Co. Ent. 610, 622.3.4. Cro.El.859. 3 Keb. 170. VVatony. versus Blany.*

So *per VVindham.* In some Cases one may plead and aver against the return of the Sheriff, Diversity between a as to a *Scire facias*, that there were other Ter- general tenants not named; for he is not Omniscient. *Non tenure*, And tho' the Sheriff return that such are Ter- and a tenants, yet that shall not conclude the Defen- special dant, but that he may say another is Tertenant *Non tenure*, of parcel, who is not warned. But *Rolls* is pleaded. express, that *Non tenure* cannot be pleaded in Error against the Return of the Sheriff, 1 *Keb.55. Cro. Jac. 50. Mitchell's Case, 2 Rolls Reg. 222.*

If

Waste.

View.

In Waste, if the Officer return, That the Jury had the View; yet if the contrary appear by Examination at the Trial, the Return shall not conclude any of the parties, 2 *Sand. 255. Green and Cole.*

Averment,
that he
was not
Sheriff.

Tho' a man may not aver contrary to the Sheriffs Return; yet he may say, he which had Indorsed his Name on the Backside of the Writ was not Sheriff, because by the Common Law, until the *Stat. of Ed. 2. c.* no Sheriff or Officer used to put their Names to the Returns; and this Averment, That he that made the Return is no true Officer, is not taken away by the Statute, *Yelv. p. 34. Arundell's Case.*

Averment
against
false Re-
turns
of Bayliffs
of Franchises.

If Bayliffs of Franchises that have Returns of Writs, make a False return, the party shall have Averment against it, as well of too little Issues as of other things, as well as he shall have against the Sheriff; but all the punishment shall be upon the Bayliffs, *Dr. & Stud. 2d Book 42. c.*

The Sheriff returns a Rescous on Mean process to a Writ of Priviledge, and Attachment awarded *nisi causa*. The Preignotaries affirmed that the parties might traverse the Return; but *Tota Curia* of Opinion to the contrary, *Sir Tho. Jones p. 39. Fawcett and Cotton.*

CHAP. X.

Of Venire facias, Habeas Corpora Juratorum, and Distingas. *What Returns shall be good on a Venire, &c. or not. Amendments of Venire's, &c. Of Tales.*

Venire fac', Habeas corpora & Distingas.

Of the Statutes of Jeofails.

THe principal Statutes of *Jeofails* are 8 H. 6. c. 12, & c. 15. 32 H. 8. c. 30. 18 El. c. 14. 21 Jac. c. 13. 16 & 17 Car. 2. c. 8.

8 H. 6. c. 12. extends to any Record, Specialty, Copy, &c. 2. Parol. 3. Plea. 4. Warrant of Attorney. 5. Writ Original and Judicial. 6. Pannel. 7. Return. But by it misprision of Clarks are only amendable: But it extends not to an Insufficient Trial, where the *Venue* is mistaken. It extends not to a Return of a Sheriff, where it should be by a Coroner. Nor to a Trial by one not returned in the *Venire fac'*. Nor to a Return of a *Venire fac'* without the Name of the Sheriff. Now these Misprisions are not remedied by 8 H. 6. c. 2. 32 H. 8. nor 18 El. c. 4. (*Viz.*) Where the Return is by the Sheriff, where it ought to be by the Coroner, when the Sheriff does not put his Name to the Return of the Jury; when no Return is on the *Venire fac'*; nor when one gives a Verdict, who is not returned; nor to Insufficient Trials, where the *Venue* is mistaken, 8 Rep. *Blackmore's Case*.

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By the Stat. 21 Jac. c. 13. After Verdict Judgment shall not be arrested, for that the *Venire fac'*, *Hab. corpora*, or *Distringas*, was awarded to a wrong Officer, upon any insufficient Suggestion, or that the Venue was in some part misawarded, or issued out of more or fewer places than it ought to be, so as some one place be right named. Or for misnaming any of the Jurors either in the Sir-name, or any addition in any of the Writs or Return thereof, so as *constat de persona*. Or for a want of return of any of the said Writs, so as a Pannel be returned and annexed thereunto; or for that the Officer's Name is not set to the Return.

No Acts of *Jeofails* extend to Appeals or Pleas of the Crown; nor to Actions or Informations on Penal Laws, except in 16 & 17 Car. 2. other than concerning Customs, Subsidies of Tonnage and Poundage, to which it extends not. But the Stat. 21 Jac. helps not, if the Christian Name of a Juror be mistaken, and the Law notwithstanding *Codwell's Case*. 5 Rep. Roll. 176: and *Cro. Jac.* 458. *Goddard's Case* remains as it was.

But its amendable per Stat. 18 Eliz. as a discontinuance of Process, as *Teppet* on the *Venire*, and *Tippet* on the *Distringas* was amended. So *Samuel* in the *Venire*, and *Daniel* in the *Nomina Jurator*.

If there be no *Venue*, its aided by 16 & 17 Car. 2. after a Verdict, if the Cause be tryed in the proper County where the Action is laid, 2 Sand. 227. *Perry's Case* in *Skinner's Case*. *Vide infra*.

*Venire with
a Proviso.*

If the Plaintiff deliver the *Venire* to the Sheriff *Tardè*, so late that he cannot serve it, the Defendant shall have a Writ with a Proviso; but at the same time the Plaintiff may have another Writ, and the Sheriff may not return which

of

of them he pleaseth, the Proviso ought to be *quando duo brevia sunt in eodem gradu & qualitate*, 8 H.6.6.

If the default be in the Plaintiff after Issue in the prosecuting of the *Venire facias*, then the Defendant may have a *Venire facias* with a Proviso; but not an *Habeas corpus* with a Proviso, until the Plaintiff have made a default in the same Writ. For he ought only to have the same Process with a Proviso, in which there was a default of the Plaintiff first; and therefore tho' the Defendant had a *Venire facias* with a Proviso, upon a default of the Plaintiff, yet he cannot have a *Nisi prius* by Proviso, without another default of the Plaintiff.

Note. The *Venire* ought to be delivered to the Sheriff four days before the Retorn of it, if the Jury dwell forty Miles off, and eight days if they dwell further from the place where the Trial is to be, *Pract. Reg.* 87.333. When the *Venire* ought to be delivered to the Sheriff.

The Name of the Sheriff to the *Distingas* and *Tales*, are of necessity; and to the retorn of the *Habeas corpora* by the Statute of York, 12 Ed. 2. c.5. and these are not holpen by any of the Statutes of *Jeofails*, *Cro.El.* 310. *Steyner and James*, *Cro.Fac.* 188. *Holdswritb's Case*, *Cro.El.* 309. *Blodwell's Case*; 482. *Weare's Case*.

What Retorn shall be good in a Venire, or not; and what shall be Error, and what amendable.

Insufficient Retorns are aided by the Statute of *Jeofails*: As upon the retorn of the *Venire fac* there wanted these words, *Quilibet Jurator per Legios*. This is not, as if there was no Retorn at all. And *per Cur*, its an Insufficient retorn

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return which is aided, and it was awarded to be amended; for the omission of Pledges is but Matter of Form, and not like to Dr. Hussy's Case, where there was a want of an Original. And so in 2 Roll. Rep. 87. the Sheriff returns a *Venire fac'*, (viz.) *Executio istius brevis, &c.* and the Pannel of the Jurors was filed to it; but under the Names of the Jurors he omitted to file the Pledges, *Cro. Jac. Moor and Blackwell, 2 Roll. Rep. 87.*

In the Writ of *Venire fac'* awarded to the Sheriff of Somerset the word (*Vicecomiti*) was omitted; yet he returned the Pannel, and his Name was endorsed. *Per Cur'*, it is Error; but because upon the Roll it was *Vic' Somerset*, it was amended, *Cro. Car. 595. Sloper and Child.*

Venire fac' was *album breve* (i.e.) no Name of the Sheriff was endorsed. It was denied to be amended, 1 *Brownl. 43. Bullen and Jarvis.*

The return of a *Venire* by one Sheriff of London, is ill, and not helped by the *Stat. 21 Jac.* But a *Certiorari Coronatoribus*, where there is but one, is well enough, *Hob. 70. 1 Keb. The King against Percival.*

Variance.

A *Venire facias* was awarded in the time of Queen Elizabeth, and a *Distingas* with *Nisi prius* in the time of King James, reciting *quod distingat Furatores nuper summonit' in Curia nostra*, whereas in truth there had not been any Summons in Curia of the King, but of the Queen only, and Trial and Judgment thereupon; and it was Reversed for this Error. For this *Distingas*,

Distingas,
Nisi prius.

gas with *Nisi prius* is a special Authority to the Justices, who being Justices by the special Commission, and not having Authority to take any Jury but such as was summoned in *Curia Regis*, there being none such, the Trial by the Jury was Erroneous, *Goodwin's Case*, cited in *Comyn's Case*,

Case; *Cro. Jac.* 161. But in the principal Case, which was Error of a Judgment in *Durham*, such Case was amended; because the Justices of *Dur-* Amend.
ham are Original Judges of the whole Record, ment in
and had the Record before them at the time of *Durham*,
the Trial, and the Writ being variant might and why.
be amended there, *Cro. Jac.* 161. *Godwin's*
Case.

The *Venire* was between *Heath* and *J. T.* and the Sheriff returned it to be between *Heath* and *W. T.* This was a Mistrial, and Judgment shall not be for the Plaintiff, *Winch. p. 73. Trist's*
Case.

Venire fac' bears *Teste* on a Sunday; it was amended after Trial, *Short and Arundel's*
Case.

A *Venire fac'* bore *Teste* out of Term, and made Amend-
to accord with the Roll; *Gonnell's* Case; and a ment by
Distringas was amended a long time after the the Roll.
Trial; yet, the Roll being good, it was amended,
Cro. Jac. 161. *Comyn's* Case.

Venire awarded, *Vicecomitibus Lond' præcipimus*
sibi, was amended after Verdict. So if after the
Hebeas ibi hoc breve, if the *nomina Jurator'* be left
out, *Cro. El.* 543. *Roll.* 201.

In the award of a *Venire fac'* *super quo præcep-*
tum fuit Vicecomiti Com', &c. it is Error; it ought
to have been *Præceptum est*, 2 *Sand.* 393.

The *Nisi prius* Roll is, That Challenge being Amend-
made to the Sheriff after Issue and Confessed, ment.
a *Venire fac'* was awarded to the Coroners; but the
Roll of *Nisi prius* was, that the *Venire fac'* was
awarded to the Sheriff. *Per Cur'*, This Roll of *Nisi*
prius being a Misprision and which ought to be
warranted by the Record, ought to be amended,
Cro. Jac. 353. *Sir Ed. Musgrave, Winch. Rep.*
p. 73.

Where a
Venire fac'
shall be of
the Issue
next
adjoning.

If the Sheriff return, That there are no Freeholders of the *Visne*, or if the *Visne* be where the Kings Writ runs not; as in the *Cinque Ports*, &c. or in a place where the men are privileged from serving on Juries out of that place, as the Isle of *Ely*, &c. the Plaintiff may pray a *Venire fac'* of the *Visne* next adjoining; and if the *Visne* be in *Wales* (where the Kings Writ runs not) the *Venire fac'* shall be directed to the Sheriff of the next English County, to cause the Jury to come *de propinquiore Visne* of his County to the *Visne* in *Wales* adjoining; for the Court shall not be ousted of the Plea, *Fitzb. Abr. tit. Visne* 8. *Jurisdic.* 24.

If the words (*quorum quilibet habeat*) be left out, or *duodecim*, or *qui nulla affinitate attingunt*; these are amendable, as Mistakes of the Clerks, *Roll.* 204, 205.

Venire fac' was in this manner, *Jacob*, &c. *Viccomiti salutem*, and saith not of what County; it was amended, *Cro. Jac.* 78. *Low and Lacock*.

Venire fac' what Returnable *coram Majore & Ballivis de Exceter*, without saying in *Curia vel hic*. Its Error; because it may be Returned in a Tavern, *Siderfin* p. 77. *Davies and Pitts*.

If a *Venire fac'* be quasht for Consanguinity to the Sheriff, a *Venire fac' de novo* shall be granted to the Coroners, 2 *Roll. Abr.* 720.

The awarding of a New *Venire fac'* to the Sheriff, where the *Venire fac'* was quasht for Favour in the Under-Sheriff, is not Error, 1 *Roll. Rep.* 272.

Process
directed
to a wrong
Officer, not
amends
able.

A *Venire fac'* is to the Coroners, without any Suggestion at all of any Challenge to the Sheriff. This is not aided by 21 *Jac. c.* 13: nor by the 16 & 17 *Car. 2. c.* 8. and the Court cannot amend this direction of Process to a wrong Officer; and

and the Court cannot examine the Truth without a Suggestion. And Judgment was arrested, 3 Keb. 624. *Hancock and Weyman*.

Venue awarded to the Coroners, and *Tales* to the Sheriff, is Erroneous, Cro. El. 574. *Morgan and Wye*.

If a *Venire fac'* be directed to the Coroners, all the Coroners ought to joyn in the Return, and so both of the Sheriffs of London ought to joyn, or else the Return is not good, *Hobart* 97.

The Sheriff need not return the Names of all the 24 on the *Distringas*, *Hab' corpora*, or *Venire fac'*, nor affix them to the said Writs, 1 Keb. 418. *Goldham and Lee*.

And it was agreed *per Cur'*, 2 Roll. Rep. 111, *Distringas* because the *Venire fac'* was good and well Returned, the *Distringas* shall be awarded by the Sheriff, *per le Vic'*. 2 Roll. Rep. 111.

If a *Distringas sicut alias* issue against the Jury, and no other *Distringas* was awarded against them before, by which the supposal of the Writ is false, yet this is not Error; for the *Venire fac'* serves instead of a *Distringas*. 2 Roll. Rep. 133.

The Pannel of the *Hab. corpora* was amended upon the Sheriffs Oath. And where the *Distringas* was blank, yet the *Venire fac'* was well returned, Cro. Jac. 483. *Church and Wrigbr.*

A contrary *Distringas* is by the Sheriff put to the right Pannel and Tried; The Trial was held good, so tho' no *Distringas* had been; for as this is, there is no Writ between the parties, 3 Bulstr. 180. *Fowkes and Child*.

Tales not returned by the Sheriff or his Deputy, or any sworn Officer; but by a Clerk of the Court, by general appointment of the Sheriff its well enough, and the Sheriff is answerable for it, 1 Keb. 357. *Lestrangle and Temple*.

The Office and Duty of Sheriff, &c.

Array returned by the Sheriff, after his Discharge, is not good, Cro. El. 369. *Hore and Broom.*

Presidents,

Distingas Juratores on the Hustings; vid. the Form, 2 Sand. 240.

Retorn' de Venire fac' Jur'

Executio istius brevis patet in quadam pannella huius brevis annex.

A.B. Armig. Vic'.

Nomina Jurator' inter A.B. Quer' & C.D. Def. in placito Transgress.

Then Write down the Names of the 24 Jurors thus:

A.W. de E. gen'

F.C. de W. Teoman

} & sic ad 24.

*Quilibet Jurator' prædictor' per se { J. D.
separatim Manucap', { R. R.*

Or, Attachiatus est per pleg'.

A.B. Armig' Vic'.

The like in the *Habeas corpora.*

Only in the Retorn of this Writ the Sheriff must return Issues on every person,

Exitus eorum cujuslibet — x s. or more, Dalt. c. 58

C H A P. XL

Of Habeas Corpus, and Returns upon it. Of Habeas Corpus. The several sorts, and the consequence thereof. Of the Returns of Habeas Corpus by the Sheriff, &c. and in respect of the Courts commanding. Rules on Habeas Corpus, who to pay the Charges. The Forms of the Returns.

AN Habeas Corpus is either *ad subjiciend'*, which is granted on the Criminal side, or an *Habeas Corpus ad respondend'* *recipiend'* or *faciend'* granted on the Pleas side; for so the Court of the Kings Bench is divided in the practice of it, (that is to say,) into Criminal Causes between the King and the Party, and Civil Causes between Subject and Subject.

Now an *Habeas Corpus ad respondend'* is, when any one is Imprisoned at the Suit of another upon a Legal Process in the Fleet, or any other Prison except the Kings Bench Prison, and a third person would Sue that Prisoner in this Court (B. R.) and cannot because he is not in Custody of the Marshal of this Court, there he may have an *Habeas Corpus* to remove the Prisoner out of the Prison where he is into this Court, to answer to his Action here. This is called a *Habeas Corpus cum causa*; and an *Habeas Corpus cum causa* doth remove the Prisoner for whom it is granted, and all the Causes which are then depending against; him for upon *Habeas Corpus* to an Inferiour Court, to remove *Corpus cum causa*, they ought to return all the Causes that are depending there concerning the Party that hath the *Habeas Corpus*, (if any of the Causes depending be above 5 l.) *Stiles Rep.* 150.

When

When an *Habeas Corpus* is Awarded and Bail taken though they be not Filed, yet presently the Prisoner is discharged, and his Sureties also in the Inferiour Court. *Cro. Jac.* 203. *Franley and Bassett.*

One was in Execution in the *Fleet*, for a Debt recovered against him in *B. R.* he being before condemned in the *Kings Bench*, for another Debt, was by *Habeas Corpus cum causa* removed into the *Kings Bench*; *per Cur.* in this Case he may acknowledge satisfaction for both Debts in *B. R.* he being in the Custody of the Marshal for both Debts. If the Marshal suffer him to Escape, he shall be charged for both the Debts. *Dyer* 152, 307.

As for Returns of Habeas Corpus.

What shall be a good Return on *Habeas Corpus*, or *Corpus cum causa*.

An *Habeas Corpus* to remove one committed for Debt from one Prison to another, may be granted Returnable *immediate*, or *indilate*, for this is only an *Habeas Corpus ad Recipiend^u* in the nature of it.

Amend-
ment.

An *Habeas Corpus* is not a Record till it be Returned and Filed, and then it cannot be amended, but it may be amended before its Filed.

Conclusion
of the Re-
turn.

Whatsoever person, or by what means soever he was committed, the conclusion of the Return ought to be *Corpus tamen ejus paratum habo*; yet it cannot always be so. 1 *Leon.* p. 70.

Return by
the Chan-
cellor of
Durham.

An *Habeas Corpus ad subjiciend^u* is always intended to him that has the Body, tho' *ad faciend^u* may be circular, as an *Habeas Corpus* was directed to the Chancellor of *Durham*, that he make a Precept to the Sheriff, to have the Body *co-*

ram

ram nobis apud Westm. The Retorn is, that the Chancellor issued a Precept to the Sheriff to return his Body before him; and that the Sheriff returned *paratum habet*, and its not said the Chancellor had him here, which is ill *per Cur.* for it should be *ejus Corpus paratum habeo*, in this Court. 3 Keb. 229. the King against Pell and Offley.

Habeas Corpus was directed to the Steward and Marshal of the Marshalsea for H. the Marshal Retorns the said H. was committed to the Custody, *per mandatum Francisci Walsingham Mil^{is} principalis Secretar & unius de privar^o Concilio Domini Regis.* This is insufficient, because the Cause of Commitment is not set down in the Retorn; Then it was amended and Retorned in this manner—*ex sententia & mandato totius Concilij privati Domini Regis ita qd^o ejus corpus habere non possumus.* This *per Cur^o* is sufficient also; he ought to have concluded *Corpus ejus tamen parat^o habeo.* Cause of commitment shewed.

Note, Where the Party is committed by the whole Council, no cause of the Commitment need to be shewed. 1 Leon. p. 70.

On *Latitat* the Sheriff Retorned, that he had Arrested the Defendant, and that such a day, and before the Retorn of the *Latitat*, *Habeas Corpus* was to bring the Body into Chancery, and there the Prisoner was Discharged; the Retorn is good, for the Sheriff is bound to obey the Kings Writs, and he cannot compel the Parties to put in Sureties here in B. R. But it was ill done of the Master of the Rolls to Discharge him. *Per Curiam*, we have oftentimes persons here upon *Habeas Corpus*, who are also Arrested by Process out of the Exchequer, or of the Common Pleas; but we will not Discharge them before they have found Sureties for their appearance, and

By Habeas Corpus to bring into Chancery.

The Office and Duty of Sheriffs, &c.

Amend-
ment.

and we cannot punish the Sheriff, for the *Habeas Corpus* was first returnable before the *Latitat*. But because the Return was *a custodia nostra exoneratus fuit*, which might be intended as to the Cause in *Chancery* only, and not for the Cause here, for he hath not alledged, that he was committed to any other in Custody; the Sheriff was to amend his Return. 1 Leon. 145. Cary and Dennis.

A Return of *Habeas Corpus* by the Warden of the Fleet, was *propter contempum extra Cur' Cellariae*. Its not good, 1 Rolls Rep. 92.

General Directions for Writs of *Habeas Corpus*, Error or Privilege, *vid. Compleat Solicitor* 106, and other *Manuals*.

That the
Justices
commit-
ted him
for a Fine.

On *Habeas Corpus* the Sheriff Returns, that the Justices of Peace committed the Plaintiff for a Fine on Contempt, for which the Court awarded him to remain in Prison till payment. *Siderfin p. 144. the King versus Mayo.*

Protection.

The Return on *Habeas Corpus* was a Protection. 1 Leon. p. 70. *Searchers Case.*

Return to
be Writ
on Parch-
ment.

Note, The Return of an *Habeas Corpus* ought to be Written in Parchment, and not on Paper; for the Return is to be Filed, and made a Record of Court, and all Records are to be Written on Parchment: And therefore, after the Return is Read and Filed in Court it cannot be amended: But in *Hob. p. 113. An Habeas Corpus* was Returned without the Sirname of the Sheriff, and after Verdict amended.

Amend-
ment.
Good to
common
intent.

It is agreed, The Return of an *Habeas Corpus* need not be so punctual as a Plea, because not made by Persons of such Learning as Pleas are; but if they be good to common intent and substance, its enough.

Upon

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1173

Upon *Habeas Corpus* granted by the Kings Bench to the Warden of the Fleet, to have here in Court the Body of *D. W.* the same Returnable at a day certain; at which day the Warden of the Fleet did refuse to make his Return, and to bring in the Body. And the Court entred a Rule to bring in the Body of *B. W.* the next day *Sub Pena* 20 *l.* and so are all Presidents of Felony and Treason.

Note, If it appear that the Commitment is good, and there is good Cause; the Court remands the Prisoner; if it is not good, they Discharge him, if it be doubtful they Ball him.

The Sheriff may suggest, that the Party will not pay his Charges of Return of *Habeas Corpus*, *ad faciend' & recipiend'*, which is at the Suit of the Party. But *contra* in *Habeas Corpus*, *ad faciend' & subjiend'*, which is at the Suit of the King, he must Return at his Peril. 1 *Keb.* 272, 280. *the King versus Armiger.*

And on *Habeas Corpus* to remove any Prisoner, the Sheriff must Return the Writ, and the Court will allow his Charges here. So in the Case of the Steward of—

Upon *Habeas Corpus*, the Officer ought to bring the Prisoner to the Court, and the Court shall tax Charges and compel payment, if the Officer and Prisoner, or Plaintiff cannot agree, or payment be not made according to the Agreement. Sir *Tbo. Jones* p. 178.

Error on a *Scire fac'*, on the Sheriffs Return being an Original Suit, lies not in the *Exchequer Chamber*; but Error on *Scire fac' Quare Executionem non*, hath been constantly allowed to lie there. 2 *Keb.* 833. *Jones and Anderson.*

*The Form of the Return.**Languidus,*

Detent' in Prifona, attamen Corpus ejus, &c.
 The Causes of the Caption and Detention Returned, *vide Dalton cap. 63.* that he was taken in Execution by the late Sheriff, &c. that he was Imprisoned by a Justice of Peace his Warrant.

Return of a Certiorari per Viscount.

The Sheriffs of *London* appeared in Court in their proper person, upon a Rule of Court, to shew Cause why they did not grant out Execution, upon a Judgment given in their Court, or else to make a sufficient Return of a *Certiorari* directed to them, because they had made three insufficient Returns. *Stiles p. 444.*

A *Certiorari*, was directed to the Sheriff to certify, whether the Conisor in a Recognizance had an Heir. *Jones p. 319.*

C H A P. XII.

How many sorts of Juries. Of Retorns, and by whom Retorned; what manner of persons shall not be Retorned on Juries, and how they shall be Discharged. Where, when, and how persons exempt shall have Action against the Sheriff for Impannelling them. Of returning trop petit Issues. Of levying the Issues. Of other Erroneous proceedings, and misdemeanors of Sheriffs about Jurors. What Estate every Juror must have by the late Statute of 4. & 5 W. & M. Of Challenges, The several sorts and causes of Challenge, and what are good or not, and when to be taken.

Of Enquiry.

Of Tryals betwixt Party and Party.

JURORS are of two Sorts.

Juries to Enquire, are grand Juries at Assizes, or the Quarter Sessions. So Juries Retorned before Justices of Peace, to enquire of Riots, Forcible Entries, and Juries Retorned before Commissioners of Sewers, or upon the Statute of Bankrupts, Coroners, &c. and Inquisitions taken before the Sheriff, and all these the Sheriff is to Summon (except Bankrupts.) *Qu.*

Now upon every Tryal in personal Actions the Sheriff must Retorn two Hundredors at least. *Cok. Litt. 1 25, 158.*

As for the number of Jurors Retorned, *vid. Dalton 86.*

Retorn

Return of Jurors.

Jury Re-
turned by
the Sec-
ondary.

If it be conceived an indifferent Jury will not be Returned in the Country, the Court on motion will order the Sheriff to attend the Secondary of the Office with the Book of his Freeholders, to have an indifferent one Returned, *Pract. Reg.* 163. So it was done in *Pooles and Markbam Case*, *Stiles* 477. because the Plaintiff in a former Tryal between the Parties had Feasted four of the Jury, and had Feasted some of the Jury that were Returned upon that Tryal; and the like was done in *Coxes Case*, 15 & 16 *Car. 2. B. R.* because Cox who was Intitled to the Reversion, had forbid Rent to be paid by the Tenants, and took on him the defence of the *Ejectment* brought against the Tenants, was of Kindred to the Sheriff and Undersheriff, and Trustee for them: But in another Cause, 17 *Car. 2 B. R.* The Court on Certificate of a Judge, that Verdict was given contrary to Evidence, would not allow, that the Sheriff should bring in the Book of Freeholders to the Secondary for the ill Example; but ordered the Sheriff should Return a good Jury in the new Tryal.

Upon motion that the Cause to be Tryed at the Bar is of great consequence, the Court will make a Rule for the Sheriff to Return 48 Jurors upon the Jury, *Pract. Reg.* 163.

Who to
Return the
Jury.

When a Tryal is to be for a thing which concerns the Undersheriff, there the High Sheriff shall Return the Jury; *aliter*, if the Tryal concerns the High Sheriff, the Undersheriff shall not Return the Jury, but the Coroners. *Pract. Reg.* 164.

What

What manner of persons shall not be Impannelled on Juries, and how they shall be Discharged, and where they shall have Actions against the Sheriff for Impannelling of them. 3 Rep. 11. 6 Rep. 108. 9 Rep. 49.

The Sheriff ought not to Return Priviledge, Exemption to be exempt from Juries; but he ought to Summon, and shall not be liable to an Action. *Siderfin* p. 243. The King and Percival, the Case was, *Venire fac* was awarded to the Sheriff of the City and County of Canterbury, to Return a Jury here at the Bar, and upon the *Distingas* the Sheriff Returnis this to be an Antient City and County, and that the King had granted to them an Exemption, not to serve in any Jury out of their City, except in Cases of High Treason; and by express words, that they should not serve *coram ipso Rege. Per Cur*.

First, The Return is ill: Because, if it were in the power of the Sheriff to Return Priviledge, he cannot do this upon the *Distingas* or *Habeas Corpus*, as he did here; because by the Returning of the *Venire. (viz.)* That there are 24 *prob* & *Legales homines* he had concluded himself, there being also Pledges upon every such Return.

Secondly, That the Sheriff may not Return so at any time, but ought to Return them Summoned, and the Parties ought to come here; and then every person who had cause of Priviledge ought to claim here in person, and not the Sheriff for them. *More* 883; 30. *Waller's Case, Siderfin* 293. The King and Percival. The Court awarded an *alias Distingas*, in regard the Sheriff cannot vary from the first *Venire* Returned; but must have the same Men, 1 *Keb.* 867. *msme Case*. And no Action lies against the Sheriff, upon their Delivery of the Writ of Exemption, *Hardress* 1. Rep. 389. *msme Case*. Priviledge of Exemption, when to be claimed.

Action, on
the Case
against the
Sheriff for
Retorning
one exempt

But in the Town of Darby, and Foxleys Case, 1 Rol. Rep. 119. Action on the Case adjudged to lie against the Sheriff, for Retorning one of a Jury, who lived in a place which his exempt, and Co. Mag' chap. 382, 130, 447, 488, 461. Action, on the Case lies against the Sheriff, for Retorning a person exempt of a Jury.

What Ju-
rors the
Sheriff
must Re-
turn.

The Sheriff must not Retorn *magis remotos, minus sufficientes & magis suspectos*, by the Statute W. 2. chap. 38. and if he do, the Plaintiff or Demandant shall recover Damages by the Statute, if he be delayed, and the Defendant, if he lose his Land, and *Articuli super chartas* gives double Damages to the Demandant.

Notice.

The Sheriff by Statute W. 2. c. 38. must not Retorn Men, *decrepit senes ultra 70 annos, homines non in patria commorantes*. This Statute is a direct Prohibition in it self, and therefore the Party grieved may have Action on the Act against the Sheriff, without giving notice of Sickness, or *Non-commorancy*; yet the use is to Sue out a Writ grounded on this Statute, that he Retorn them not, and notice by word is good, if notice were requisite, Co. 2 Inst. 477.

Remedy
for undue
Retorns.

Who is the
party grie-
ved that
shall have
his Action.

Peers of Parliament not to be Impannelled, nor Tenants in Ancient Demesne.

Where the Demandant or Plaintiff is delayed of his Suit, by such Retorn of the Sheriff, as *magis remotos*, he shall by the Statute recover Damages against him, or where the Defendant, after he has lost his Land by the Oath of them so Retorned contrary to the Form of the Statute; and after he doth convict them in an Attaint and so is restored, he may then have his Action on this Statute for his Damages, 2 Inst. 448. *sur Stat. W. 2. c. 38.*

If one dwell in *Middlesex*, and had Freehold in the County of *York* over 40 l. the Sheriff of *York* may not Summon him to *Middlesex*, to Try a Cause at the Bar in *Westminster* for Land in *Yorkshire*, *W. 2. c. 42. 1 Rob. Rep. 163.*

In a Writ of Right or any other Writ, a Baron Peer, of the Realm may excuse himself.

Action on the Statute, *W. 2. c. 8.* for Retorning Men more remote or suspected, Count and Bar inde. *Dr. Bonbams Case. 8 Rep. 118.*

Upon a Tryal between a Peer and another, the Sheriff must retorn a Knight; but if he do not, and the Peer doth not challenge the Array, but the Jury give a Verdict, he shall not have advantage of this afterwards, *Lord Powes and Kertman P. 9 Car.* Peer.

A Jury was Empannelled of the Town of *Southampton*, and called to the Bar and made default, and the Men of that Town shewed to the Court a Grant made to the Inhabitants of that Town, that no Retorn should be made of the Men of that Town to be of any Jury, and prayed the allowance of their Charter; and the Court appointed them to plead their Charter, and so they did, *1 Brownl. p. 36.*

If a Man has a Charter of Exemption, and sheweth it to the Sheriff, yet he may Retorn him; for the Sheriff is not a Judge to allow or disallow his Charter, but he must Sue out a Writ of allowance of his Charter, and deliver the Writ to the Sheriff, and shew his Charter to him, and then if the Sheriff Retorn him, Action on the Case lies against him.

On a *Dorsetshire* Tryal at the Bar, on default of all the Jurors but three, It appeared, that the Sheriff had by command of the Plaintiff, countermanded their Summons against the Greece of the Defendant, who now prayed a Tryal. Sheriff countermands the Summons.

But this being impossible, for the Court in such
 No *Tales de* Case will not supply the Jury with a *Tales de Cir-*
circumstan- *cumstantibus* : But they offered to *Non-suit* the
 tibus on Plaintiff on Record, and conceived the Defen-
 Tryal at dant should contribute to the payment of the
 Bar. Jury, because they should remain indifferent
 Jurors, 2 *Siderfin* 77. *Hunt and Hollis*.

President. Retorn of a *Distingas*, for appearance of the
 Defendant in the Hustings, 2 *Sanders* 233.

Retorn of a Jury by the Bedels of the four
 next Wards, 2 *Sanders* 244.

Issues. If the Sheriff Retorn but 40 *l.* which is the
 Action case usual Issues on *Distingas Juratores*, the Court on
 against the prayer of the party cannot cause him to Retorn
 Sheriff for greater; but only make a Rule, that good Issues
 Retorning be Retorned: But by *Twisden* Action on the Case
 two several lies against the Sheriff, 1 *Keb.* 475. The Plain-
 Issues. tiff ought to bring a Writ against the Sheriff on
 Averment against the Averment, that he might have levied greater
 Sheriffs Re- Issues, and so the Court may increase them.

retorn of Issues. Note, Before Stat. *W. 2. c. 39.* the Plaintiff
 could not aver against the Retorn of the Sheriff,
 if he Retorned too small Issues, for he is but an
 Officer in Court, and has no day in Court to
 answer the Plaintiff party: But now by 1 *Ed. 3.*
 the Plaintiff may aver what the value of the
 Issues be, Rents of the Land, Corn in the Grange,
 What shall Hay in the Barn, all moveables except Riding
 be said Issues. furniture, and Utensils of House.

Retorn of the grand Inquest.

Stat. 11 *H. 7. c. 9.* No Indictment shall be found
 by any persons named to the Justices, without
 due Retorn of the Sheriff, but by Inquest of law-
 ful liege People Retorned by the Sheriff. One
Scarlet whom the Sheriff had not Retorned, by
 confederacy betwixt him and the Clark who read
 the

the pannel, procured himself to be sworn of the grand Jury, with intent to indict his Neighbours maliciously, and he did so; he was adjudged an Offender within this Law, and by *Statute 3 H.8.* ^{Justices may alter the Pannel.} c. 10. The Justices of Gaol Delivery, or Justices of the Peace, of whom one to be of the *Quorum*, in open Court may alter the Pannel Retorned by the Sheriff, to enquire of the King only, by Addition, or subtraction of any of the Jurors so Retorned, and they have power to command the Sheriff, to put other in the Pannel according to their Discretion. And the Sheriff ought to Retorn the Pannel, so reformed upon the Penalty of the said Act. So that none can be of any Grand Inquest, but by the Retorn of the Sheriff, *Coke 12 Rep. Rob. Scarlets Case, Dalton. 394.*

Note, By the Statute of 4 & 5 of *William and Mary*, all Jurors are not to have 10 *l.* per annum *vide infra.*

It is very needful for the High Sheriff, to have a Book containing the Names of all the Freeholders in his County, and their sufficiencies, that he may make the Pannells according to his Oath, and better know Pledges and Sureties.

As for Issues lost for default of appearance, *scilicet* by Jurors, or by Tenant, or Demandant; the Sheriff may not levy till they shall be estreated under the Seal of the *Exchequer*, and the same delivered to him, for without Warrant he may not Levy the same, 27 *Ed. 1. c. 7.*

Other erroneous Proceedings and Misdemeanors of Sheriffs, about and concerning Jurors.

Superfedeas
restrains
the Sheriff
from Re-
turning a
Jury.

What is
confessed
by plead-
ing *In*
nullo est
erratum.

Reasonable
things
shall be
intended
to be done.

After the parties were at Issue in Trespass, and an *Habeas corpus* awarded against the Jury, the Common-Bench (in which the Action depended) awarded a *Superfedeas, quia improvide, &c.* which was delivered to the Sheriff, who notwithstanding returned the Jury and tried the Cause. This was assigned for Error, and in *nullo est erratum* pleaded, it was adjudged Error. For the Error assigned is a Matter of Fact, depending on a Matter of Record; and then the Defendant by pleading *In nullo est erratum* had confessed this, (that is to say) That such *Superfedeas* was awarded and delivered to the Sheriff before the Trial. Upon which it follows, that after the *Superfedeas* delivered, the hands of the Sheriff are closed; that he cannot proceed to distrain the Jury, nor to Return the Writ before the Justices of Assize. Its a manifest Error, if the Sheriff Return the Writ of *Hab' corpora* at the Assizes with *Nisi prius* after *Superfedeas* awarded for staying the Return of the Writ; as the Proceedings are erroneous in *Inferior Courts* after *Habeas corpus* delivered without a *Procedendo*, *Yelv. p. 57. King and Andrews. Cro. Jac. p. 43. King and Hill.*

It is not necessary for the Sheriff to Return the Pannel of the Jurors Names, but to say they are *de vicineto* of such a place; for so it shall be intended, and the Forms of all Returns of Jurors are so, *Pract. Reg. tit. Return.*

In a Writ of Error Eleven Jurors were Returned and one Stranger; yet because it was the Return of the Sheriff, it shall not abate, 1 *Roll. Rep. 302.*

The

The Statute of ~~Ediz.~~ provides, ^{There} shall be two Hundredors in a Jury; yet ^{Reasonable things intended to be done.} its never seen that the Retorn of the Sheriff is so. So the Statute of 42 Ed. 3. c. 11 is, That the Sheriff shall arraign the Pannel in Affize four days before the Affize, yet its never Retorned to be so done; but such reasonable things shall be intended to be done, unless the contrary appear, 2 Siderfin p. 144. *Barclay's Case.*

An Attorney was picked over the Bar, for directing a Sheriff to retorn Jurors Names, *Mo. 882. n. 1237. Hanson's Case.*

Note, But now by the Statute of 4 & 5 W. & M. Stat. 4 & all Jurors (other than Strangers, *per medietatem Linguae*) Retorned upon Trial of Issues joyned in the Kings-Bench, Common-Pleas or Exchequer, or before Justices of Affize, or *Nisi prius*, Oyer and Terminer, Gaol-delivery, or General Quarter Sessions of the Peace, shall have in their own Name or Trust within the same County Ten pounds *per annum* above Reprizes, of Freehold or Copyhold Land, or in Ancient Demesne, or in Rents in Fee-simple, Fee-tail, or for their own or some other persons Life; and in Wales Eight pounds *per Annum*. If any be retorned of Lesser Estate, he may be discharged by Challenge, or upon his own Oath; not shall a Jurors Issues be saved but by Order of Court, for reasonable Cause proved upon Oath.

The Sheriff, Coroner, or other Minister retorning any person of Lesser Estate, shall forfeit Five pounds to Their Majesties for every person so Retorned.

They must be summoned six Days before the day of their Appearance, and none shall take a Reward to excuse a Jurors appearance, on pain to forfeit Ten pounds to Their Majesties.

This Act extends not to Cities, Burroughs or Towns Corporate; a minor point of law.

Of Challenges.

A Challenge to the Jurors is Twofold

To the Array, }
To the Polls. }

To the Array, is, to except against all the persons Impannelled: And as to this there is a

Principal, }
Challenge, } or
for Favour. }

Note, That the Challenge to the Array is in respect of the partiality or default of the Sheriff, or other Officer that made the Return, and not in respect of the Persons returned, where there is no partiality or default in the Sheriff. For if the Challenge to the Array be found against the party that takes it; yet he shall have his particular Challenge to the Polls.

If the Sheriff or other Officers be of Kindred or Affinity to the Plaintiff or Defendant; if the Alliance continue, a good cause of Challenge, 1 *Bulstr.* 5, 6, 7, 8. *Earl of Salop* versus *Earl of Rutland*.

Challenge was taken to the Array, because the Sheriff was Cousin to the Lessor in *Ejectment*, and concludes not to the Favour; its a principal Challenge. Yet in *Roll. Rep.* 183. its adjudged a Principal Challenge; and in 1 *Roll. Abr.* 328. *Guest and Bridgman*, saith, It is not a Principal Challenge that the Lessor is Cousin. But *Trin.*

1657. B.R. in the Lord *Brook's* Case its a Principal Challenge, *Cro. Jac.* 575. *Simonds and Walshe*, 2 *Rolls Abr.* 182.

Venire fac' was awarded to the Coroners on surmize, that the Lessor in *Ejectment* was Servant to the Sheriff. It was doubted, whether it was a Principal Challenge in 1 *Jac. Harbottle's* Case. *Coke* said, It was Adjudged in 27 *El.* in *Packington's* Case, that it was not a Principal Challenge; but in *Spicer's* Case it is Resolved otherwise, *Cro. Jac.* 21. *Dyer* 7, 367.

If the Challenge be taken for Cofnage, it ought to be shewed *coment* Cousin; but in such case Challenge to a Juror, is not necessary.

Its clearly a good Challenge to the Array, that the Sheriff is Cousin to the Wife of the Defendant, tho' the Wife is no party to the Action: But it must be averred, that she was alive, or had Issue at the making of the Pannel.

1. If the Jury may try a Challenge for Cofnage of the Sheriff to the Plaintiff or Defendant, and sometime the Coroners, or Attorneys in Court, are Elifors, 2 *Roll. Rep.* 363. *Lloyd and Elifors. Williams.*

If the Defendant challenge the Array, for that the Sheriff is Cousin to the Plaintiff; it is no Counterplea of the Challenge that the Sheriff is also Cousin to the Defendant; but the Array shall be quasht, because the Defendant first took the Challenge, *Pa/chb.* 41 *El. B.R.*

2. If any one or more of the Jury be returned at the denomination of the party, Plaintiff or Defendant, the whole Array shall be quasht.

3. If the Plaintiff or Defendant have an Action of *Battery* or *Debt* against the Sheriff, or if the Sheriff have parcel of the Land depending on the same Title; or if the Sheriff or his Bayliff be either of Counsel or Attorney, or
Servant

Servant or Gossip of either party; all the Array shall be quasht.

Elisors.

A Prayer to *Elisors* in Trials at Bar may be at the Suit of the Defendant or Plaintiff; but in *Nisi prius*, at the Prayer of the Plaintiff only.

Consanguinity or Affinity are the principal Causes; but its no Challenge to the Array, if all the Jurors be of Affinity.

Challenge to the Array for Favour, That the Sheriff is Servant to the Plaintiff, or was Arbitrator for a party: That the Sheriff purchased part of the Land in question: That one party is Tenant or Servant to the Sheriff.

Malice between the Sheriff and one of the parties, is good cause of Challenge, That one of the parties has brought an Action of *Debt* against the Sheriff, &c. but not that the Officer has Debt against the party; for he may demand his Debt without Malice.

This kind of Challenge being no principal Challenge, must be left to the Conscience and discretion of the Tryors.

Challenge
to the Pdll.

Challenge to the Polls, *i. e.* to the particular Jurors; and these are of four sorts:

1. Peremptory, without shewing any Cause; and this for Treason is 35. Felony 20.

2. Principal Challenge to the Polls; so called, because it stands of it self, without leaving any thing to the Conscience or Discretion of the Tryors. Now this is such Matter as proves evident Favour or Enmity in the Juror.

And this is, *Propter respectum*; as the Nobility may be challenged, or he may challenge himself, *propter defectum*, as Aliens, Villains; not having Freehold sufficient; not having two Hundredors. *Propter affectum*, as Jurors of Kin or Blood to either party; that he has formerly Tried the Cause; Counsel; not a Commissioner for

Exami-

Examination of Witnesses ; Fellow-Servant ; for Favour ; *propter delictum*, as Outlaw'd, &c.

3. Challenger to the Poll must shew Cause presently. After one hath taken Challenge to the Poll, he cannot challenge the Array.

4. If the Plaintiff alledge a Cause of Challenge against the Sheriff, the Process shall be directed to the Coroners; and if any Cause against all the Coroners, then the Court shall appoint Elisors. Sometime, two of them that be *Elisors*, Impannelled.

When any Challenge is made to the Polls, two Tryors shall be appointed by the Court.

Note, All Challenges must be taken before the Jurors are sworn.

No Challenge shall be admitted against the Tryors, appointed by the Court.

There may be a Challenge to the Pannel by Exception to the Sheriff, after a *Tales* prayed to him : So after a *Venire fac'* prayed to him, tho' the cause of Challenge were before the Prayer, *Hob. p. 235.*

Upon a Writ of *Error* the Record was certified, That the Challenge was to the Sheriff for Cousinage, and after a *Venire fac'* awarded to the Coroners, upon the Diminution it may not be Certified, That the Challenge of the Cousinage was after the Return of the *Venire fac'*; because this is contrary to the Record before certified, *1 Roll. Abr. 764. Floyd and Bethell.*

That the Sheriff was *quondam* Servant to the Defendant, Earl of Rutland, is no principal Challenge, its past and executed. *Aliter*, had it been so at the time.

To say, That between the Sheriff or Officer that returns the Pannel, and one of the Defendants, there was an Action of *Trespass* then depending, is a principal Challenge.

C H A P. XIII.

Of the Writ of Enquiry of Damages, and the Sheriffs demeanor therein, and in what Cases a new Writ shall be granted, or not. By whom to be executed. The time of Executing it. The Form of the Return of a Writ of Enquiry of Damages.

Vide sub tit. Waste.

A new Writ granted.

IF upon the Executing of a Writ of Enquiry of Damages the Sheriff refuseth to swear and examine some of the Witnesses produced on either part, and yet doth execute the Writ; the Court will grant a new Writ to the party grieved, for the old Writ was not well executed, *Pract. Reg.* 348.

A Writ of Enquiry of Damages directed to the Sheriff, cannot be executed by a Bayliff of a Liberty, *Hob.* p. 83.

Amended.

Writ of Enquiry of Damages varies in the return of the Award upon the Roll, which was amended and made agreeable to the Roll, *Mo.* 711. n. 998.

As to time of Executing it.

If a Writ of Enquiry of Damages be Returnable *Ostavis Michaelis*, the Sheriff may take the Inquest and enquire the Damages the day of the Return, and after he Returns it the same day; this Writ is well executed, *Trin.* 38 *El. B. R. Gawen and Ludlow.*

If

If on a Writ of *Enquiry of Damages* the Inquest be Impannelled the *Essoyn* Day, and the Jury then hear their Evidence two or three days after; yet this is well executed, *Mich. 11 Car. I. B. R. Stainby and Waterman.*

Retorn of a Writ of Enquiry of Damages.

Executio istius brevis patet in quadam inquisitione huic brevi annex.

INquisitione indentat' capta apud C. in Com' War' (tali die & anno) coram A. B. Armig', Vicecom' ejusdem Com', Virtute cujusdam brevis domini Regis, eidem Vic' direct' & huic inquisitioni consut' per Sacrament' R.S. F.G. &c. (ad numerum 12 Jurors) qui dicunt super Sacramentum suum quod A. P. in brevi Inquisition' huic consut' nominat' sustinuit damna occasione (Transgress. prædict') per H. in præd' brevi nominat' prout in eodem brevi fit mentio ad 40 s. & pro mis' & custag' ipsius A. P. per ipsum circa sectam suam in hac parte appositis ad 40 s. In cujus rei, &c.

In this Writ, to Enquire of Damages in *Trespass*, the Jury cannot find that no *Trespass* is done. Neither may the Sheriff make such a Retorn; but if the Jury will find no Damages, the Sheriff must make his Retorn accordingly.

C A P. XIV.

Where and in what Cases the Sheriff's Return of a Devastavit shall be good or not, and the late practice in such Cases.

Sheriff
concluded
to make
any return,
contrary to
the Verdict.

THe Defendant pleads *plene administravit*, and Verdict is for the Plaintiff, this estops the Sheriff of the County where the Trial was to Return *Nulla bona*; for he is concluded by the Verdict to make any Return contrary to it; but the Sheriff of another County shall not be so concluded. But the Sheriff of the County where the Writ is brought ought to Return a *Devastavit*, and thereupon the Plaintiff shall have Process into another County, 2 *Leon. n. 90. p. 67.* Noon's Case, 1 *Andersf. 32.*

And the Question further was, If a *Testatum* shall issue into another County, before the Sheriff of the County where the Writ was brought had returned a *Devastavit*, and not Resolved; but without doubt its the safer way to do it upon the Return.

The principal Case was; Debt in *London* against an Executor, upon *plene administravit* it was found for the Plaintiff, the Plaintiff assigned the same to the *Queen*, and a *Scire fac'* issued out of the *Exchequer* against the Defendant, &c. into the County of *D.* and the Sheriff returned *Nulla bona, &c.* which was not good, *causa qua supra*, tho' the Debt was well assigned. And upon a *Constat* of Goods in another County, he may well have a *Scire fac'* into another County, 2 *Leon. n. 90. Bendl. 23.*

But

But if Executors plead *plene administravit*, it was found they had Assets, and a *Fieri fac'* issued to the Sheriff, who Retorned that they had not any thing within the County. *Per Cur'*, Its a good Retorn, because the Jury it may be found Assets in another County; so the Verdict shall not bind the Sheriff, 2 *Brownl. Rep.* p. 116. *Morgan and Took.*

If it appear by the Defendants Plea that he hath Assets in his hands, and if the Sheriff cannot levy the debt in the Defendants hands, he may upon the Defendants own shewing (without any damage) retorn a *Devastavit*; and if Judgment be given against an Executor on Demurrer, and Execution awarded, the Sheriff cannot Retorn *Nulla habet bona Testatoris*. But it is a *Devastavit* if it be found against the Executor by Verdict. *Cro. Eliz.* 102. *Stubs and Rightwise.*

When the Sheriff may retorn *Devastavit*.

Judgment was given in *Banco de bonis Testatoris*, Special and *Fieri fac'* issues out; the Sheriff Retorns *Scire fac'*. *Nulla bona*; the Plaintiff may have a Special *Fieri fac'*, That the Sheriff shall levy the Debt of the Goods of the dead, and *si sibi constare poterit*, *Faux Re.* that the Executors have wasted them, then *de torn bonis propriis*; and if the Sheriff makes a False Retorn, the party may have an Action on the Case. But if upon the Retorn of *Nulla bona*, and a *Quia Testatum est*, that they have wasted, a Writ of *Enquiry* is awarded what Goods were wasted, and its found that Goods *ad valentiam* of the Debt were wasted, and upon that a *Scire fac'* to have Execution *de bonis propriis* upon two *Nichils* retorned; This is Erroneous, and if the Inquisition be false, the party hath no Remedy, and upon two *Nichils* retorned the Defendant shall be condemned; yet perhaps he had not Notice, 5 *Rep. Pettyfer's Case.*

The Office and Duty of Sheriffs, &c.

To that purpose is a Case in *Littleton's Reports*; Judgment was given against the Executor, and Execution awarded; and the Plaintiff informs the Sheriff, that the Executors have wasted the Goods of the Testator; but the Sheriff would not return a *Devastavit*. *Henden* Serjeant moved for a Commission, to enquire whether the Goods were wasted; and if it be found, then the Sheriff might return a *Devastavit* without peril. But the Judges said, they would not Advise, because it was a New course, *Lit. Rep.* 47.

Scire fac de bonis propriis shall not be awarded upon the surmise of the party, but on the Return of the Sheriff of a *Devastavit*.

But in *Aldworth and Peel's Case* it was Resolved. There Debt was brought against *Peel* as Executor, the Plaintiff had Judgment to recover *de bonis Testatoris*; and thereupon a *Scire fac* was awarded, and the Sheriff returneth *quod nulla habuit bona Testatoris*; and the Plaintiff surmizeth, that he had wasted the Testator's Goods; whereupon he prayed a *Scire fac*, why he should not have Execution *de bonis propriis*. And *per Cur*, this Writ shall not be awarded upon the surmise of the party of a Devastation; nor in any case where the Judgment is *de bonis propriis*; unless it be on Return of the Sheriff, where he returns a *Devastavit*, *Cro. El.* 530. *Aldworth and Peele*.

If *A.* recover against *B.* Debt and Damages, and after *B.* died, and Administration is granted to *C.* his Wife, who wastes the Goods, and after takes *D.* to Husband, and a *Fieri fac* is awarded *de bonis Testatoris* in the hands of *D.* and *C.* and the Sheriff Returns *Nulla bona*, &c. and upon this, on surmise that they have wasted the Goods, another Writ was awarded to the Sheriff, *Si sibi constare poterit per Inquisitionem*, that they have wasted the Goods, then to warn them to shew cause why Execution should not be *de bonis propriis*, and so an Inquisition is taken. And the Sheriff

Sheriff Returned, That they had not in their hands any of the Goods of the Intestate; but that the Feme being Administratrix of her first Husband, had Goods of the value of 100 l. of the said Intestates, and had wasted them during her Widowhood, and the Husband had not wasted any of them. *Et si devasterunt* according to the Writ, the Jury pray the Discretion of the Court. *Per Cur'*. This Special Return of the Sheriff is good, and by this the Husband is to be charged for the Conversion of the Wife. *Cro. Car. 603. King and Hilson.*

The Sheriff Returns a *Devastavit* (no Assets over being in Question) on *Non est factum* against an Administrator by *Fieri fac'*, with a *Scire fac'*. *Per Cur'*, Tho' it be a False Return we cannot help it, but its at the Sheriffs peril, 3 *Keb. 530. Faux Return.*
Brown and Collins.

On *Fieri fac'*, with a *Scire fac'* and Assets, the Sheriff returned Waste, and the Defendant pleaded *plene administravit*. The Plaintiff demurred, because the point of the Inquisition is not traversed, and Judgment *pro Querente*.

Debt against an Executor, and a Recovery by Verdict, and Judgment upon this, and a *Fieri fac' de bonis* of the Intestate; upon which a *Devastavit* was returned, an *Elegit* issues *de bonis propriis*, *Mo. 299. n. 446. Mead and Cheney.*

If A. recover against B. and Execution *de bonis Testatoris, si non, de bonis propriis*, and the Sheriff upon a *Fieri fac'* levies the Moneys; and after to another *Fieri fac'* to him directed, Returns a *Devastavit*; and upon this a *Scire fac'* is granted against B. to shew cause, &c. B. may discharge himself of this *Devastavit* by Plea, that the Sheriff levied the Money upon the first *Fieri fac'*.
1 Roll. Abr. 903. Middleton and Powell.

The Party may discharge himself of a *Devastavit* by Plea, That the Sheriff levied the Money on the first *Fieri fac'*.

The Office and Duty of Sheriffs, &c.

President,

Retorn of a *Fieri fac'* upon a *Devastavit*, Dyer

222.

But now the Practice is more nimble than by the tedious Inquisitions, and that is, by bringing Action in the *Debet* and *Detinet* against an Executor, suggesting a *Devastavit* in his Declaration, without any Retorn of the Sheriff, *Siderfin* 397. *Wheatby and Law*.

On a *Fieri fac'* in a *Scire fac'* to have Execution
de bonis propriis.

Plea to
Scire fac'
de *Devastavit*.

Sheriff Retorns upon Inquisition, That the Defendant (Administrator) *habuit bona & catalla in manibus suis quæ fuerunt del intestate tempore mortis sue ad valentiam debiti & damnorum recovered by the Original Judgment; and that the Defendant bona & catalla illa ad valent' debiti & damnorum prædict' vendidit & elongavit ac in usum suum proprium convertit & disposuit. Defendant at the Retorn of the Writ comes in, & protestando that he had fully Administred, for Plea he saith, non vendidit seu elongavit, &c. Et hoc, &c. Plaintiff replies, That the Defendant vendidit & elongavit, &c. and found for the Plaintiff. Per Cur', Tho' this is no apparent Issue (but whether *devastavit vel non*) for the Defendant might pay Debts with his proper Moneys, and that he might dispose of the Goods to his own use; yet its good after Verdict. For the Writ of *Scire fac'* suggests, That the Defendant bona & catalla, &c. disposuit ea intentione qd dicta executio fieret, 1 Sand. 306. *Merchant & Driver*. And it is the Defendant's own fault to take such an Issue; for he might have taken Issue, that he had not Goods of that value, or that he had paid any special Debt.*

C H A P. XV.

Of Prisons, to whom they belong, and the place where kept. Who may be keeper of Gaols, &c. and how forfeitable. Of the Sheriffs of London's Prison, and of the Marshalsea, and the Grant thereof. Of the Sheriffs demeanor towards Prisoners. Of the Prisoners Murther, and what payment of a Debt to a Gaoler shall be good, or not. And of those that break Prison.

Of Prisons, &c.

ALL Prisons are the Kings; but a Subject may be Keeper, *Co. 2 Inst. 100, 580.*

The custody of County Gaols is incident to the Office of Sheriff, and inseparable from the Sheriff; and therefore if the King grant the Custody of such a Gaol to another, its void: *County Gaol inseparable to the Office of Sheriff.* For the Sheriff is the immediate Officer of the Kings Courts, and shall be answerable for Escapes, and be subject to Amerciaments, and therefore he shall put in such Keepers as he shall answer for, *4 Rep. 34. Mutton's Case, 14 Ed. 3. c. 10.*

The Sheriff may remove his Gaol from one place to another within his Bailiwick. And the Sheriff may hold the *Affizes* in the Castle where he held them there by Prescription, altho' the King grant the Custody of the Castle to another. So that tho' the Sheriff may keep the Gaol in what place he will within his Bailiwick, yet in a particular place not without Prescription, *Hob. p. 202. 1 Anders. 345.*

Q 2

Infants

The Office and Duty of Sheriffs, &c.

Infants or Feme Coverts are keepers of Gaols, to charge them in Execution for an Escape, 2 *Inst.* 382.

As the King may by his Letters Patents make a County, so he may in the making of it, save and except to him and his Successors such part of the Jurisdiction or Priviledge, which the other County (from which it is exempted) had in it before. As in many places in the Realm, the Gaol of a Town, which is a County of it self, or a place priviledged from the County, is the Gaol of the County, and the place where the Affizes or Gaol-delivery is holden, is within the County of the Town, and yet serves also for the County at large: As in the Sessions-Hall at *Newgate*, which serves as well for the County of *Middlesex*, as for *London*, and yet it stands in *London*; but by Usage it hath been so. And so the Gaol of *Berry*, &c. *Popb.* p. 16. *The Case of the Town of Gloucester.*

Prison of
the Sheriffs
of *London*.

The Sheriffs of *London's* Court is moveable, and the Sheriff is chargable with a Prisoner while he is in Prison, tho' he be Judge also. For why should the City Serjeants give Security to the Sheriff, unless the Sheriff be the Officer? And it hath been Ruled, That altho' the Sheriff be Judge, yet a Precept is directed to him. Therefore its a good Plea in Debt on Escape, That the Sheriff Commanded the Serjeant at Mace to deliver the Prisoner to him, *Siderfin* p. 318. 2 *Keb.* 141. *Husband and Cole.*

Note, The Sheriffs of *London* may make their Houses their Prisons, as well as the Compters: And the bringing the person arrested to the Sheriff, albeit it be *sub dio*, and not into any House; yet its as good as delivering into the Sheriffs Prison. *Vid. infra.*

Note,

Note, Upon Forfeiture the Custody of a Prison is given to another, and yet till he is actually removed he shall answer for all Escapes, and he that occupies the Gaol by *Tort* shall answer; and actual Escape lies against him who had possession at Will, 11 H. 7. 23. Dyer 274.

But if he be not sufficient, *Respondeat superior*. 9 Rep. Reynold's Case. *Vide supra*.

Grant by Patent of the Office of the *Mar- Marshal-
shalsea* of the Kings-Bench for years is not good, *sea*. for the Inconveniences that might ensue; it may thereby become in suspense upon probat of a Will, till Administration committed thereof; and it might fall to persons Insufficient; and in case of Fee or Tail it descends to an Infant, the Court puts a fit person in for the time, Cro. Car. 587. Meade versus Sir J. Lentball.

Vid. more of the *Marshalsea*, 9 Rep. Sir G. Reynold's Case, 10 Rep. Case of the *Marshalsea*.

Marshal of the Kings Bench shall not be privileged from Execution. But if the Court do grant him in Execution its an Escape as to all the Prisoners; but they may make a new Marshal, and then take him in Execution, *Siderfin* p. 68.

By *Hyde*, Chief Justice of B. R. The Court *Informas* cannot sequester the Marshal's Office, for not *versus le* paying a Debt due to any private man. But by *Marshal*. *Windbam*, an Information may be against the Officer for this ill using his Office to shift mens Debts, and on that the Court may sequester. So on any Contempt by him, 1 Keb. 846. Roberts versus Sir J. Lentball.

Warden of
the Fleet.

Attorney of B.R. brought Trespass against the Warden of the Fleet, who advised with the Court of C. B. that he being an Officer of this Court, ought not to be impleaded elsewhere. *Per Cur'*, Its equality of Liberty, and he that first begins the Suit shall have the privilege; and so he was advised to Answer, 2 Leon. p. 41. *Povey's Case*.

G. brought Action of Debt against the Warden by a Bill of *Privilege*, but he would not appear; and the Court were in doubt, what remedy the Plaintiff hath to compel the Defendant to appear. For he cannot be fore-judged the Court, because he had Estate of Inheritance in the said Office: But the Warden having made a Lease of his Office for three years, he shall not have his Liberty, 2 Leonard 173. *Gittonson's Case*.

As for Gaols which have been granted in Fee, or Life, or which have been held by Prescription, may be forfeited several ways.

Where the Gaoler detains a Prisoner after Fees paid, the King may seize the Gaol, 2 Inst. 43, 53.

Of the Sheriff's Demeanor towards Prisoners.

Britton c. 11. saith, No Prisoner shall be put in Irons, but Traytors, or those taken for Felony or Trespass in *parcis & vivariis*, or which shall be found in Arrears in Account before they be attainted. *Vide 1 Ed. 3. c. 7*.

My Lord Coke, in his 3 Inst. 35. extremely inveighs against Racks. It is true, the punishment is amazing; but as the sins of every Age grow more impudent, so their penalties ought to be more severe: And if we will translate our Neighbouring Nations Villanies, we ought to imitate

imitate their punishments; especially for Offences publick, and which go to the ruin of a Nation.

I will put a common Instance. At this present our current Trade is almost spoiled by our Non-current Money, and he that shall break open a Bakers Window to take a Sixpeny Loaf to supply meer Nature, shall be as severely treated, as he that Clips and Counterfeits the Coyn; I mean, a little dry Hanging serves for both; for as to the Sledge, its insignificant. And we shall conclude, It will never be otherwise unless the Breaking on the Wheel and dying by piecemeal, sometimes used in other Countries, may terrifie Spectators, and those to whom it is Reported; *ut pœna ad paucos, &c.*

Tho' there is no person that has a greater Veneration for our Common Law than my self; yet I conceive I may say, the spreading and new Villanies of our Nation are chiefly owing to our undistinguishing punishments.

He that takes but Half a Crown on the Pad shall be hanged, and deservedly; and he that Blasphemes his God, Murders his Father, and commits a Rape upon his Mother, shall e'en make his Exit with a few wry wet Looks, and a little Swing or two: Which punishment I must needs observe is almost grown into Contempt by the major part of Criminals.

I need but mention the notorious Case of Felton; and the late Story of the barbarous Midwife.

By our Law it is plain, A Prisoner in Execution shall not be in Fetters, but for Criminal Causes.

But to return to my purpose: A Prisoner (while he is such) is under protection of the Law, and accordingly is to be used.

The Office and Duty of Sheriffs, &c.

And therefore where a Prisoner, by duress of the Gaoler, comes to an Untimely End, it is Murder in the Gaoler, 3 *Inst.* 52, 91. And the Law implies Malice in him in respect of the Cruelty.

And therefore if a man dye in Prison, the Coroner ought to sit upon him, to the end it may be enquired, if he came to his death by the duress of the Gaoler, or otherwise, 3 *Inst.* 91, 52.

If the Sheriff, or other Officer, where he ought to Hang the party attainted, according to his Judgment and his Charge, will (against the Law) of his own wrong, Burn or Behead him, &c. the Law in this case implies Malice in him.

By the Statute of 14 *Ed.* 3. c. 10. If a Keeper, or Under-Keeper of Prisons, by too great duress of Imprisonment, or by Pain, make a Prisoner become an Appellor, (*viz.*) an Approver against his Will, its Felony.

Every Imprisonment is in Law *duritia*, *duress*; a little addition to it by the Gaoler, is too great duress in this case.

There is a remarkable Case in 3 *Bulstrode*. The Court was moved by Sir G. Reynell against one of his Prisoners, who had much misbehaved himself, offered to Escape, and had endangered the killing of one of his Servants, and that he had spent Ten pounds after him; and he would have had the Court to have fined him. But *per Cur.* We will not do it; you must keep him in *arcta custodia* in Irons, and you may Indict him for these Misdemeanors, and by that way you may have him Fined, 3 *Bulstr.* 245. Sir G. Reynell's Case.

The payment of a Debt by a Prisoner to a Gaoler is not good; and therefore in Debt the Defendant pleads, That he was a year in Execution and the Plaintiff could not be found, whereupon he paid the Money to the Gaoler. The Plaintiff replies, That he was to be found at *D. absque hoc*, that he absented *eo animo*, to keep the Defendant in Prison. And the Defendant to this Demurs, because the Marshall may dye, and no Recovery can be by the Defendant against the Marshall, if he do not pay it over. But the Court gave Judgment for the Plaintiff; it being not reasonable to pay Money to the Gaoler for the Plaintiff, whether he will or not. And also, they thought it too hard for the Plaintiff to prove payment, or to prove Assets in the hands of the Marshall's Executors, 3 *Keb.* 748. *Taylor and Baker, Sir Tho. Jones's Rep. in same Case.*

Where the Imprisonment is unlawful the Prisoner is not to pay for his Diet, 1 *Roll. Rep.* 329. *Oliver's Case.*

Note, If a Prisoner is in Execution, and the Gaoler or Sheriff dye, he is in abeyance and custody of the Law, 3 *Rep. Westby's Case.*

A Gaoler is not bound to deliver his Prisoner, who is Discharged by the Court, until he pays his due Fees.

A Prisoner acquitted of Felony, the Gaoler may take Twenty pence, which is called a Bar Fee.

Every

The Office and Duty of Sheriffs, &c.

Every Sheriff Bayliff of Franchise, and every other person having Authority of keeping Gaols, or of Prisoners for Felony, shall certifie the Names of every such Prisoner in their keeping at the next General Gaol-delivery in every County or Franchise where such Gaol is, there to be Kalendred before the Justices of the Delivery of the same Gaol, whereby they may, as well for the King as the party, proceed to make delivery of such Prisoners, according to the Law, on pain of Five pounds, 3 H.7. 3.

If the Gaoler shall suffer an Escape, the High Sheriff or Gaoler are chargeable therefore.

C H A P.

C H A P. XVI.

When one may be said to be in Execution or not. And when without Prayer or not. In what Cases the Sheriff may break open an House to do Execution or not. To what Sheriff, and of what place and County shall Execution be Awarded. Of a Cap. ad satisfaciend' for what and against whom it lies, and the Sheriff's Demeanor therein, and Returns thereupon.

Of Execution.

When one may be said to be in Execution or not.

When one shall be in Execution without Prayer of the Plaintiff or not.

IF a Man recover Damages in Action on the Case against J.S. in the *Kings Bench*, the said J.S. being in *Custod' Marechal'*; yet he shall not be in Execution on this Judgment, altho' it be within the year, before Prayer of the Plaintiff; for the Marshal may not take notice of every ^{Where a} Judgment against every Prisoner; but upon Man Prayer of the Plaintiff, a *Comittitur* shall be entered upon the Roll, and then he is in Execution; but if the Defendant being taken in Execution, be brought on by *Habeas Corpus*, and then an Entry of the *Comittitur* is made in the Book of the Office, its Good *Hill. 12 Jac. B. R. Sir Henry Bellows and Hansford. 2 Rolls Rep. 112.*

If

The Office and Duty of Sheriffs, &c.

If a Man recover in *B. C.* Debt and Damages against *J. S.* and had Judgment, altho' that *J. S.* be a Prisoner in the *Fleet* for other Causes, (which is the Prison of the Common Bench) and the Warden informs the Court of it, and the Court commands him to retain him, in Execution until satisfaction of the Judgment; yet he is not in Execution, because he was not brought to the Bar by *Habeas Corpus*, and viewed and demanded of the Prisoner, if he be the same person, who is Condemned or not; and it is the Office of the Court to oppose him, *Dier* 13, 14. *El. p.* 306. *pl.* 63. So if the Warden inform the the Court of *Chancery*, that *J. S.* (which is Prisoner there on a Judgment) is in his Ward for certain Causes, on which the Court commands the Warden to Return him in Execution, until satisfaction of the Judgment; yet *J. S.* is not in Execution upon the Judgment, because this was not done at the request of the Plaintiff, but without his Prayer, for it may be he will Elect another Execution, *Dier* 306, 63.

At the
Prayer of
the Party
or not.

In Debt against *J. S.* if the Defendant betaken upon a *Latitat*, and committed to the Marshal for default of Bail, and after the Plaintiff recovers against him he continuing in Prison; yet he shall not be in Execution for this Judgment, before the Prayer of the Plaintiff, *M. 4 Jac. B. R. Car. and Copping.*

On *Cap.*
Utlagat.

If a Man recover in Debt and Outlaw. The Defendant after Judgment, and after within the year the Defendant is taken by *Cap' Utlagatum*, he shall be in Execution for the Plaintiff before Prayer, because the Outlawry was at the Suit of the Party, *5 Rep.* 88. *Garmons Case, H. 41. El. B. R. Bonner and Stackley.* Otherwise it is, if he be taken in Execution after the year, because in that Case he may not have any *Capias* against him

him, *Hill. 38. El. B. R. Norton and Sharp.* But if a Man Outlaw the Defendant in Debt after Judgment, and after within the year, the Defendant is taken by *Cap' Usuratum*, altho' he be in Execution for the Plaintiff *prima facie*; yet he may make Election, that it shall not be an Execution for him, *44. El. B. R. Shaw and Cutter.*

If Execution by default be Awarded in a *Scire fac'* upon a Judgment in Debt, and the Defendant four years after was in the *Fleet* for other Cause; and by *Habeas Corpus* he was brought up to the Common Bench, and being opposed by the Court, if he were the person who was condemned, *ut supra*; and he grants it, he shall be committed in Execution, at the Prayer of the Plaintiff as it seems, tho' it be after the year and day, *Dier 214, 147.*

If *A.* recover against *B.* by Judgment in the *Kings Bench*, and upon this *B.* renders himself to Prison, and after brought a Writ of Error and had a *Superfedeas*; yet after upon Prayer of the Plaintiff, the Court may commit him in Execution, altho' that the Record be removed; forasmuch as he had not found Bail upon his Writ of Error, *p. 9. Car. 1. B. R. Symonds Case.*

How and in what Cases the Sheriff may break open an House to do Execution.

The Leading Case in this Point is *Semaines Case*, reported by my Lord Coke, in *5 Rep.* and in *Crokes Eliz. 98.* out of which I shall Collect these following Resolutions.

The

The Case was,

* A Joynt Termor of an House with *B.* dies,
 * being bound in a Statute. The Sheriff Returns
 * him dead, Consee Sues another Writ to ex-
 * tend his Lands, which he had at the time of his
 * death or after, and what Goods he had at the
 * time of his death: The Sheriff Impanels a
 * Jury to enquire what Goods, &c. and it was
 * found there were divers Goods of the said de-
 * ceased at the House of *B.* in London: And the
 * Sheriff came with the Jury to view Appraise,
 * and seise them for this Debt, and the (Defen-
 * dant) Surviving Termor, *premissorum non igna-*
 * *rus* shut the Door, and disturbed him to make
 * Execution.

It was resolved,

On *habere* *fac' possessi-* First, Upon Recovery the Sheriff may break
onem. open an House, and deliver it to the Plaintiff;
 for the Writ saith, *habere fac' seisinam, or posses-*
sionem. And after Judgment it is not the House
 of the Defendant in Right.

Secondly, upon a *Capias ad satisfaciend'*, the De-
 fendant may not break open any Mans House
 to make Execution; but in all cases, when the
 Door is open the Sheriff may Enter to make
 Execution of Body or Goods.

Thirdly, In all Cases where the King is Party,
 so on *Hue and Cry*, if no Door be open, the
 Sheriff may break open the House to take him,
 or to do Execution or other Process; as upon a
Cap' Utlagat', or upon Contempt: But he ought
 first to signifie the Cause of his coming, and
 request the Owner to open the Door, but not to
 break open any Mans House by night.

Fourthly,

Fourthly, Upon a *Fieri fac'*, or *Extendi fac'*, the Sheriff may not enter into the House of any, the Door being shut, nor draw a Latch no not after request and denial; yet tho' the Sheriff be a Trespassor in breaking open the House by *Fieri fac'*, yet the Execution is Good.

Fifthly, The House of any one is not privileged but for himself and his Family, and his own proper Goods, not to protect any who flee there, or the Goods of another conveyed there; and in such case after request, the Sheriff may break open the Door; but in the principal Case he did not request it, and so the shutting the Door by the Defendant was lawful, and no Action lies against him. And as for the Allegation of (*premissorum non ignarus*) it is too general, and Notice ought to be specially alledged, that he was Sheriff and what he came to do; and the Defendant being a Stranger to the Execution, he is not bound to take notice of the Sheriff's intent.

Upon a *Fieri fac'*, a Barn which stands in the Field may be broken by the Sheriff, because it is not part of the Dwelling-house, and there needs no request, *aliter* had the Barn been adjoyn- ing and parcel of the House, *Siderfin* 186, 187. *Pentons Case*, 1 *Bulst.* 146. *Foster and Hole*.

But tho' a Sheriff cannot break open a House, being to take Execution by *Fieri fac'*, yet when the Door is open that he enters, then he may and ought to break open the Door of an Entry or Chamber which is locked, or break open any Chest which is locked and take the Goods, and if he do not, an Action of the Case lies against him, 1 *Browl. Rep.* 50.

The Office and Duty of Sheriffs, &c.

Diversity was taken in *White and Wiltshires cases* where the Execution is lawfully begun, there the Sheriff or his Officers may break the House to make Execution, otherwise, when it is not lawfully begun. If one be Arrested by the Sheriff and he escapeth to his own House, and the Sheriff pursues him and breaks open the Doors of his House, and takes him again, the party shall never take benefit of this his own wrongful escape.

Two of the under Sheriffs Bayliffs entred into the House, the Door being open, to take Execution of the Goods, and the Plaintiff shuts the Door upon the Bayliffs, and imprisoned them for two hours; the Sheriff may break open the House to Rescue his Bayliffs. *Cro. Jac. 555. White and Wiltshire.*

Note, the Sheriff was fined for breaking open an House, and rushing in with Sword drawn, the Door being half open, on private Process. By the *Stat. W. 1. c. 15.* the Sheriff may break open an House or Castle to make Replevin when the Goods of another are Conveyed there.
5 Rep. Semain's Case.

If a Bankrupt convey his Goods to his Neighbours House, the Serjeant Commissioners may not, but the Sheriff may break open the House, because he is a sworn Officer of the Kings *Goodwins Law against Bankrupts 65. Quer.*

Upon a Commission of Rebellion out of Chancery, the Sheriff may break open the House to apprehend the party therein, whether in his own or anothers House. *Cromp. fo. 47.*

The Sheriff may take the *posse Comitat.* to do Execution *Per Stat. W. 2. c. 39.* and he may take it *post vel ante querimoniam*, but he may take it after resistance, and not before; for *sequi debet*

bat potentia justitiam non procedere. Co. 2 Inst. p. 454.

But suppose the Sheriff cannot do Execution by the *posse Comitatus*, then saith the Book 1 *Keb. 99. 117.* he ought to acquaint the Deputy Lieutenants of the County, and if they assist not, he must acquaint the King and Council, and yet the Sheriff shall not be amerced, if he return he cannot do Execution; but in *Godbolt. 79.* upon a resistance of Execution, the Council Table refused to meddle in it, because the Court of Kings-Bench ought to see their own Judgment executed: and a Writ was prayed to the high Sheriff with a special Rule, that the high Sheriff should execute it himself, which the Court granted, and a Tipstaff to fetch the under Sheriff up to return his Writ, which is better than an Attachment which is returnable by it self. 1 *Kel. 99. 117. Godbolt 79. Bush and Chamberlaine.*

To what Sheriff, of what place or County shall Execution be awarded.

If Recognizance of Bayl be taken by a Judge of the Common-pleas at *Serjeants Inn* in London, upon an Original brought in London, and certifies this into the Court of Common-Pleas, and is there enrolled; but it appears on Record, that it was taken as before, a *Scire fac'* may be awarded upon this Recognizance to the Sheriff of London where the *Capias* was, for there was the Commencement of it, and also the *Scire fac'* may be awarded to the Sheriff of *Middlesex* where the Recognizance was enrolled, 1 *Roll. Abridg' 891.* or *Middle-Johns and Lee, Andrews and Harbin, Poliney and Sex on Forebench, Feildgate and Gardener, contra. 5 Marie by Brook,* And by all the Prothonotaries. then, it ought to be brought in London and not in *Middlesex*.

Scire Fac.
the Sheriff
of London
or Middle-
sex on
Recogni-
zance of
Bail.

delex. But in 13 Car 1. the Prothonotaries certified that it may be brought in *London or Middlesex.*

Serjeant at
Mace may
execute
Elegit.

W. 2 c. 18. saith *Vic. ei liberet Medietat' per rationabile extent. (viz.) per inquisition*, and the Sheriff is sworn, and a Serjeant at Mace is not sworn to take a Jury; yet the Stat. extends to every other immediate Officer, to any of the Kings Courts of Record, and so a Serjeant may execute this, and a *Fieri Fac'* also, and this Stat. couples *Elegit* with a *Fieri Fac'* and limits both to be executed by the Sheriff, but in *Wast* and *Redisseisen*, the Sheriff must do it in person. 4 Rep. 65, 66. *Fullwoods. Case*

The Writ
to levy
Damages
in Wast
to whom
to be
derefted.

If a Man recover Damages in Action of *Wast* in one County, the Writ to levy them shall issue to the Sheriff of the same County where the Action was first brought, and not to any other; but if the Sheriff return he had nothing, he shall have execution into any other County where the Recoveror will. 29 Ed. 3. 9. b.

Having treated of Executions in general, as far as relates to Sheriffs; I shall now proceed to speak of Executions in particular; as to the Sheriffs demeanor about the executing of them, and making due Returns upon them. And 'tis a Point very fit for the consideration of all Sheriffs specially.

There are but 4 mannner of Executions, Two by the Common Law, and Two by the Stat. Law,

by Common Law	{ <i>Levari</i> & <i>Fi' Fac'</i> }	{ Executions. }	{ Stat. Sta- ple, St. Mer- chant, Recogni- zance. }
By Statute Law	{ <i>Capia.</i> <i>Elegit.</i> }		

Of which I shall treat distinctly, limiting my self therein to the duty and Behaviour of Sheriffs, And first of the *Capias*.

Capias ad Satisfaciend is a judicial Writ and lyes where a man hath recovered in a personal Action, any Debt or Damages in the Kings Court, directed to the Sheriff to command him to take the Body of the person condemned in Debt and to put him in Prison till satisfaction made.

Of *Capias ad satisfaciend* against whom and *Cap. ad sa.* for what it lies, and the Sheriffs demeanor therein, and return thereof.

It lies not against an Earl, Duke or Baron, or their Wives, except in some special cases, nor against an Heir or Executor, except in false pleading.

It lyes against such Persons against whom a Lyes not *Capias* doth lye in the commencement of a Suit, ^{for a recovery of} as Debt, Account, Action on the Case, Trespass ^{Damages} *Vi & Armis*, Annuity and Covenant; but it lies ^{in all Actions.} not for a recovery of Damages in a real Action.

If one be in Execution by *Ca. Sa.* which is returned, no other Execution can be sued against him, his Lands and Goods, *vid. Stat. 21 Jac. 14.*

A *Capias* is to have the Body of such an one such a day, and the Sheriff brings the Body or returns the Writ before the day, it is good. *Winch. p. 7.*

If one be delivered in Execution by the Kings Writ, he is presently in Execution and in Custody without Laying hands on him to Arrest him, by *Cok. C. 7.*

The Sheriff is to be Excused for taking one by a false Name in Execution; and if the Judges ^{Sheriff} takes one admit this false Name, yet the Judicial Writ ^{by a false name} ought not to be Examined by the Sheriff, *Lanc. name Rep. 49, 52. Doyly and Jolliff.*

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One in Execution may not be discharged by *Habeas corpus* or Writ of *Priviledge*; and if one taken on Contempt be taken in Execution, he shall not be set at Large, *Siderfin* 289. *Swallowe's Case*. *Id.* p. 90.

Execution
against one
attaint of
Felony.

The Sheriff may execute Process of Execution against one attaint of Felony and in Custody, if he please; and if the Felony be pardoned, or the Attainder reversed, he shall be in Execution, *Mo.* 178, 274. *Mich.* 10 *Car.* 1. *B. R. Chappel's Case*.

Ca. sa. af-
ter a Fi. sa.

If a man recovered Debt against *B.* and levy part of the Debt by '*Fieri fac*', which is Returned; yet he may take the Body of *B.* by a *Cap' ad satisfac'* for the residue, 4 *Fac. B. R. Carter and Copping*.

Tho' the King's Debtor be in Execution by his Body or his Land, yet the Subject may take him in Execution by his Body; for the Statute of 25 *Ed.* 3. 13. is to be intended of Executions of Lands and Goods, and not of the Body, which is *tout à tout*, *Hobart* 160. *Shirley's Case*.

Of Escape of one in Execution by *Ca. sa.* *Vide tit. Escape*.

Sheriffs of *Bristol* took the Plaintiff by a *Cap' ad satisfac'*, and detained him in Prison until the party Defendant, and now Plaintiff, paid the Money to the Sheriff. *Per Cur'*, This was contrary to his Warrant, which is, *Ita quod habeat denarios in Curia*; and because he did not so, he is chargeable to him that was in Execution, *Heley* 122. *Read and Earlfield*.

Return'.

A *Capias ad satisfac'* was Returnable *Quind. Mart.* and that Writ was Returned *Album breve*, and a *Testatum* thereupon, and the Defendant taken by it. The *Testatum* issued out accordingly,

ly, because the *Capias* was not Returned. And the Court granted a *Superfedeas*, 1 Brownl. 40. *Superfed. Reyner and Mortimer.*

Debt on Judgment in B. R. the Defendant confesseth the Judgment, and Execution above an year; and not being able to find the Plaintiff, he paid the Money to the Marshal. Plaintiff Replies, he did not absent voluntarily; and the Defendant demurrs. Judgment *pro Querente*. The Sheriff on *Cap'* cannot receive the Money as *Fieri fac'*, nor is the party remediless, for he may pay his Money into Court, 1 Leon. 140. and have an *Audita Querela*; but the Plaintiff were remediless should the Gaoler be Insolvent, *Dom' Rex and Javan*. He on Indictment and Conviction of a Disorderly House, was Committed to the Marshal for payment of a Fine, but before actual Imprisonment the Fine was paid to the Marshal; yet Resolved, this is no good payment, and the party was forc'd to pay it over again. *Per Jones*, It is doubtful whether Voluntary payment to the Sheriff on *Fieri fac'*, before Execution of his Goods, be pleadable in Discharge (but that is Adjudged it is so,) much less on a *Cap'* which is *ad satisfaciend'* the party in Court, and he is Committed *quousque satisfaciatur parti*, not the Sheriff, 3 Keb. 788. *Taylor and Baker.*

Verdict,

If the Issue be, Whether the Sheriff took J. S. and kept him in Prison under his Custody in Execution by force of a *Capias ad satisfaciend'*; and the Jury found he took him by force of an *Alias Cap' ad satisfaciend'*; Although it is not found he kept him in Execution for the Debt and Damages aforesaid, according to the Issue;

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yet this is a good Special Verdict. For it shall be intended ; for the Consequence is necessary of that which is found, because he cannot take him, but he ought to be in Execution, *Hobart, Foster and Jackson's Case.*

Vide 3 Rep. 67. Westby's Case. 5 Rep. Blomfield, Garner, Frost and Drury's Case.

How Execution upon a *Ca. sa.* shall be sued upon a Judgment against two or more , and he shall have but one Execution ; and the Execution of one is not sufficient, but the Sheriff may take the Body of all in Execution. *Vid. 5 Rep. 86. Blomfield's Case, and 11 Rep. Godfrey's Case.*

C H A P.

C H A P. XVII.

What Goods, &c. of whom shall be taken in Execution on Fieri facias, or not. After the Sheriff has seised, how he stands in the Eye of the Law, either to bring Actions for the Tortious taking them away, or to make satisfaction to the party who recovered. Remedy against the Sheriff for the Money to the value of the Goods taken in Execution, or not, and how to be pursued. The Sheriffs Office and Demeanor in executing a Fieri facias, and of the Venditioni exponas and the Return; what shall be a good Return on the Fieri fac', or not. Of Restitution to Lands or Goods seised by the Sheriff after Reversal of the Judgment, and after Sale of the Sheriffs selling a Term for years taken in Execution, and when such Sale shall be good, or not. Whether a Scire facias shall go into Wales.

Of Fieri facias.

I Shall next Treat of Execution by *Fieri fac'*; which is a Judicial Writ, lying for him who hath recovered Debt or Damage, directed to the Sheriff, Commanding him to levy the same of the Defendant's Goods: And it lies within a year and day; but after the year there must be *Scire fac'*.

This Writ of *Fieri facias* is only against the Goods and Chattels of a man; (*viz.*) Leases for years, Corn growing or sown upon the Land, or movable Goods; as Cattel, Corn in the Barn, Household Goods, Money, Plate and Apparel, Co. 1 Inst. 290.6.

What Goods, and of whom shall be taken in Execution by Fieri facias, or not.

Goods
pawned.

Goods pawned shall not be taken in Execution for the Debt of him which pawned them, during the time they are pawned, *Kitchin* 226.

Fornace
annexed.

The Sheriff upon a Writ of Execution may not seise and sell to the party a Fornace annexed to the Freehold; for this would be Waste in the Lessee, 37 *El.B.C. Day and Austin*.

Bona Ecclesiastica.

The Goods Ecclesiastical of Clergy-men are not to be taken by the Sheriff, but by the Bishop, upon a *Levari fac*, on a Recognizance, 2 *Inst.* 472.

If one sell any Goods to another depending an Action against him, these Goods afterwards shall not be put in Execution; for they were lawfully bought, (if done *bona fide*, and valuable Consideration.) But if a *Fieri facias* be directed to make Execution of Goods, and after the *Teste* of the Writ, and before the Sheriff executes it, the party sells his Goods *bona fide*, they may nevertheless be taken in Execution; (*aliter* now by the Statutes of *Frauds* and *Perjuries*.) *Cro.El.* 174. *Mo.21.n.72.*

Goods in
the hands
of the
Executor.

If the party dies after the Writ of Execution awarded, and before it be served, the Sheriff may serve it of the Goods in the hands of the Executor. For by the Execution awarded the Goods are bound, and the Sheriff needs not take notice of his Death, *Cro.El.* 181. *Parker and Mosse*, 1 *Leon.* 144, 145. *mesme Case.*

After

'After the Sheriff has seized the Goods', how he stands in the Eye of the Law. Either to bring Action for the Tortious taking them away, or to make satisfaction to the party who Recovered.

The Sheriff may have *Trover* or *Trespass* at election, against him that takes them away; as *Wilbrabam and Snowe's Case*.

The Plaintiff being Sheriff seizeth the Goods in Execution by force of a *Fieri fac^{ti}*, and after (and before the Sale of them) the Defendant takes them and carries them away, and converts them to his own use; and the Plaintiff (being Sheriff) brings his Action of *Trover*; and Adjudged the Action well lies. By the Seizure of the Goods in Execution the Sheriff hath a property in them, so that he may reseize them and sell them, as well when he is out of his Office, as before, *Mod. Rep. 2 Sand. 47. Wilbrabam and Snow*, *Mod. Rep. 57. Ayre and Aden*, 2 *Sand. 244. Mildmay and Smith, Yelv. contra fo. 44.*

Therefore *Dyer* 99. cited in *Dalton* 147. is not Law, which saith, That by the Seizure of the Sheriff, the property is not altered until they be sold.

After the Debt levied, the Sheriff is Debtor to the Plaintiff, and capable of a Release from him, the Action ceasing against the Defendant is *ipso facto* by the Law transferred to the Sheriff, having both the Judgment to make it a Debt, and the Levy to make him answerable; and tho' Action of *Account* will properly lye in this Case, yet the same will many times bear both Actions, tho' the Moneys be received by *auter mains*, or the like, *Hob. 206, 207. Speak and Richards.*

This

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The Case is Reported by *Roll*, thus :

If a Sheriff levy Money upon a *Levari facias*, upon a Recognizance at the Suit of *J. S.* and Returns the Writ served; *J. S.* may have Debt against the Sheriffs Executors. But in that Case the Plaintiff demurred to the Defendants Plea, and Concludes ill, 1 *Roll. Abr.* 418.

Action
against
the Sheriff
or his
Executor,
for levying
money on
the *Levari*
and not
returning
the Writ.

The Plea was grounded upon a Release, and should have demanded Judgment if the Defendant should be admitted to plead a Release, made after the Sheriff had made his Return; and in such case Action lies against the Sheriffs Executor, altho' it does not appear that the *Fieri fac'* on the Judgment was Returned; for this is not material, inasmuch as the party is discharged by payment of it without Return: And this is not grounded on a personal *Tort*, but on a Contract in Law; and this is not a simple Contract, but principally grounded upon a Record, as it was Adjudged in *Parkinson and Culleyford's* Case.

Action by
Executor,
for levying
the Debt
and not
returning
the Writ
in *vita*
Testatoris.

But in an *Anonymous* Case, *Cro.Car.* 297. Action on the Case was brought by Executor against the Sheriff, who had levied the Debt in Execution, and did not return the Writ; and after the Testator died, and the Plaintiff for that *Tort*, *in vita Testatoris*, and for the Loss which came to him, brought the Action. The *Quere* was, if it lies by the Executor, because its a personal Wrong to the Testator: And the Court was divided, *Cro.Car.* 297.

Vide Escape.

Where

Where and what remedy against the Sheriff for the Money to the value of the Goods taken in Execution, or not.

The diversity lies on the Sheriffs Retorn.

Retorn.

If the Sheriff in executing a *Fieri fac'* doth not misbehave himself, he shall not be charged in Debt or *Scire fac'*, unless it appear by his Retorn that he had the Moneys in his hands. As if the Sheriff retorn, *Cepi & seisi feci in manus meus bona & catalla ad valentiam 160 l. que remanent in manibus meis ob defectum emptorum.*

On this Retorn the Sheriff shall not be charged in Debt or *Scire facias*, because it appears not that he has misbehaved himself. But if upon the *Fieri fac'* the Sheriff Retorn, That he hath levied the Money, and doth not pay it to the Plaintiff at the Retorn of the Writ, the Plaintiff may have a *Scire fac'* against the Sheriff, to shew Cause wherefore the Money should not be levied of the Goods of the Sheriff, 2 Sand. 344, 345. *Milamay and Smith, Hurton* 32. 11. *Smith and Linsey.*

So if in *Fieri fac'* to levy 200 l. Debt, &c. the Sheriff Retorns, That he had made a Warrant to his Bayliff, who had seised divers Goods of the said *S. ad valentiam* of 160 l. and that they were rescued out of their Custody, *ita quod* he could not Levy the Debt, and that the said *S. nulla alia habuit bona.* The Plaintiff may bring a *Scire fac'* to have Execution against the Sheriff for the Moneys, according to the value Retorned, and the Sheriff shall pay it out of his own proper Goods, 1 *Anderf.* 247. *Roke and Wilmot.*

With

Old Sheriff.
Scire fac.
 against the
 old Sheriff
 to pay the
 Money lev-
 ied in ex-
 ecution.

With this agrees, 9 *Ed.4.* 50. *Scire fac'* 21. If the Sheriff Return upon a *Scire fac'*, that he hath levied the Money and hath the same in Court, but hath not the Money at the day, and then a new Sheriff is chosen; in this Case it being on Record, that the Money is levied by the old Sheriff, a *Scire fac'* shall issue against the old Sheriff to pay it. And if he cannot or will not Discharge and pay the Money, the Party shall have a *Fieri fac'* or *Elegit* against the Sheriff, of his proper Goods.

On *Fieri fac'* the Sheriff seized several Goods which were Mercery Ware, and Returns *Fieri fac' ad valentiam*—which Return was Filed. The Sheriff appears and prays to amend the Return, because some of the Goods were impaired by lying, and he could not get Buyers.

Return not
 amendable
 after it is
 Filed.

Per Cur' 1. Such Return may not be altered, after it is Returned and Filed.

2. Where the Sheriff Returns *Fieri fac' ad valentiam*, this shall be no excuse of his payment of the Money, because he might have Returned he had seized the Goods, and that they remain *pro defectu emptorum*, and then he may be excused, if the *bona peritura* perish, *Siderfin* p. 40. *Needham and Bennet*.

Therefore the Sheriffs were ordered to pay the Money, and to answer Interrogatives for their Contempt, having been ordered to bring in the Money, and not appearing till a Tipstaff was sent.

Amend-
 ment of
 Return.

As to amendment of Returns. Matter of Form in a Return is amendable, but not matter of fact; which goes to justification of the Imprisonment, 2 *Bullst.* 259. *Dr. Alphonses's Case*.

The Sheriff Demeaner in Executing the Fieri fac'.

If the Sheriff have a *Fieri fac'* against a Mans ^{Tresp. ver.} Goods, and before Execution he pay him the ^{us vicount} Money, in this case he cannot do Execution after, and if he do, an Action of Trespass or false Imprisonment lies against him, *B. R. p. 12 Fac. 1.*

As to breaking open Houses to do this Execution *vid. supra.*

The Sheriff upon a *Scire fac'* cannot deliver ^{Cannot de-} the Defendants Goods to the Plaintiff in satisfac- ^{liver Gooda} tion of his Debt, but must return the Execu- ^{in satisfac-} tion in Court, *Cro. El. 504. Tompsen and Clark* ^{tion of the} *Noy 56. Mesme Case.* ^{Debt.}

Action on the Case was brought against the Sheriff, for fraudulent omission of Execution of Goods that were in *Conspetu suo*; but he saith not in his Declaration, that he knew them to be the Goods of the Defendant in that Action: And for this omission after Verdict Judgment was Arrested, by *Twisden and Windham, 1 Keb. 946.* The gist of the Action is the fraud, which cannot be without notice, which is now wrapt in the Verdict, tho' it could not be pleaded, the Sheriff being bound to take notice whose Goods they are, *Russel and Comber.*

On *Fieri fac'* against J. S. who has the Goods of Sheriff ^{Sheriff} A. in his possession, if the Sheriff sell these Goods, ^{sells the} Trover or Trespass will lye against him; and to ^{Goods of} prevent this, all the Sheriffs of England take ^{J. S. a} Security, *Keb. 693. Sander's Case.* ^{strange} ^{Security.}

Quere if the Seriff may take Bond for his Security: But the safest course is, for the Sheriff to enquire by a Jury in whom the property of the Goods is, or else ~~not~~ to meddle with any such Goods, which do ~~not~~ plainly appear to him to be

be the Defendants, and it being found by the Jury, that excuseth the Sheriff.

Pleading by the Party, who has paid the Money to the Sheriff.

In *Detinue* the Plaintiff had Judgment, and brought *Scire fac'* to have Execution. Defendant pleads, that upon a *Distingas* to the Sheriff on that Judgment, he delivered such Goods to the Sheriff, and for the residue that they were appraised at so much by Inquisition taken by the Sheriff, and that he delivered the Money to the Sheriff, but he doth not aver this matter to be Returned by the Sheriff; its a good Plea, for otherwise the Defendant should be prejudiced, for he might have twenty several Executions served against him upon one Judgment; and he should be put to his remedy against the Sheriff only, who may be insolvent. And it is a less mischief to inforce the Plaintiff, if his Plea be true, to take his Action for it against the Sheriff, and if it be not true, to take lisse thereupon, *Crok. El. 390. Atkinsons Case.*

Where the Plaintiff shall have a new *Fieri fac'*, or not. Defendant discharged upon seising the Goods by the Sheriff. Now if the Sheriff levy Goods by force of a *Fieri fac'*, and delivers them not to the party, nor returns the overplus, the Plaintiff may have a new *Fieri fac'*, because a Record shall not be avoided by a matter in Fact: But by the taking the Goods of the Defendant to the value of the Debt by the Sheriff, the Defendant is discharged, altho' the Sheriff do not satisfie the Plaintiff, therefore he shall not have a new Execution, 2 *Rolls Rep. 57. p. Jac. 1 Rolls Ab. 902.*

Where

Where a Sheriff on a *Fieri fac'* Retorns, that he had seised Goods of lesser value which were rescued, and that *nulla alia bona, &c.* the Plaintiff may not Sue a new Execution, but only for the surplus beyond the value of the Goods rescued, 2 *Sanders* 344. *Mildmay and Smith.*

If the Sheriff levy Money in Execution, the Lord Keeper cannot order the Money shall stay in the Sheriffs hands, or order that the Plaintiff shall not call for it, *Marsh Rep.* 54.

If the Sheriff shall Retorn *Fieri feci, sed non inveni emptores*, then a *Venditioni exponas* shall go out.

Of the Sheriffs Selling Goods on Fieri fac', and of the Venditioni exponas.

As to what Sale is good or not.

If the Plaintiff tenders the Debt, its a wrong for the Sheriff to sell the Goods, 1 *Keb.* 655. *Le-fans Case.*

If Goods remain in the Sheriff hands, for default of buyers, and there perish, the Sheriff shall not be chargable. But if the Sheriff refuse a buyer, Action on the Case lies, 2 *Keb.* 464. *Needham's Case.*

The Sheriff took the Defendants Goods in Execution by *Fieri fac'*, and before Sale the Record was removed by a Writ of Error into the *Exchequer Chamber*, and a *Superfedeas* awarded; and the Sheriff returned upon the *Fieri fac'*, seizure of the Goods, and that they remained in his hands *pro defectu emptorum*; and he also returned, that a *Superfedeas* was awarded, &c. and hereupon it was prayed for the Defendant, that he might have restitution of his Goods. *Crok. Eliz.* 597.

But

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*Venditioni
exponas.*

But *per Curiam*, Altho this Record be removed, and notwithstanding the *Superfedeas* awarded, in regard it came not to the Sheriff, till he had begun to make Execution, as appears by his Return, that a *Venditioni exponas* shall be awarded to perfect it.

And altho' the Plea Roll be removed, yet it shall be awarded on the Return of the *Fieri fac'* which remains still in the Office. But as it is in 1 Keb. 324. *Brownwood and Estwel*, if the Error were allowed before seizure, then tho' the Sheriff be unpunishable in that Case, yet *Superfedeas* notwithstanding Execution done shall go, *quia improvide, &c.*

Goods re-
stored in
specie.

And *per Curiam* if the Goods be sold, the Money may be brought into Court to be restored to the Party; but if not, the Goods may in *specie* be restored.

Under sale.

But if before Sale a *Superfedeas* comes to him, if the Sheriff after Sells the Goods without a Writ of *Venditioni exponas*, this is void. p. 8. Car. 1. *Scarling and King*.

The Sheriff sells Bricks for 7 s. per thousand on the place, for which he might have 16 s. per thousand. The question was, Who should pay the overplus, the Buyer or the Sheriffs Executors. And *per Curiam*, The Sheriffs Executors shall pay the overplus; the Sale being absolute, and not an Argeement to Sell, 3 Keb. 285. *Cutten and Hunt*.

The Sheriff perswaded the Jury to prize the Goods at undervalue, and so sold them. This is an Oppression enquirable at the Affizes by Indictment, Crok. Jac. 426. *Cayers's Case*.

If the Sheriff upon a *Fieri fac'* against J. S. Where the
 seise certain Wood whereof J. S. was possessed, old Sheriff
 and the Sheriff pay parcel of the Money received, after a
 and does not Return his Writ, and after the Writ of
 Sheriff is removed and another Sheriff chosen, discharge
 and after the Writ of Discharge delivered to him, may sell.
 he sells the Wood, this is a lawful sale, because
 by the seisure altho' the Writ is not returned, he
 is chargeable to the Parry, *Tr. 3 Jac. B. R. Cro.*
Jac. 73. Ayer and Aderly. And there a *Distrin-*
gas issued to the new Sheriff to distrain the An-
 cient Sheriff to expose to sale, which does not
 give to him Authority to sell, but compells him
 to do that which he might do by Law. But if
 upon a *Fieri fac'*, the Sheriff Returns that he had
 seised the Goods, but *non invenit emptores*, and But the
 after he is removed, and a new Sheriff made, the old Sheriff
 old Sheriff may not sell them after, tho' a *Di-* after re-
stringas come to him, and if he sell them the moveal
 sale is not good, for the new Sheriff must sell may not
 them, *P. 32. El. Dodd. and Conney, 2 Latch 117,* non invenit
Dixon's Case. emptores

A *Venditioni exponas* may not be awarded, if it returned.
 appear that the Goods are out of the Hands of *Venditioni*
 the Sheriff, 2 *Sanders 344. Mildmays Case.* *exponas.*

*What shall be a good return of the Sheriff on a Fieri
 fac' or not.*

Note, If the Sheriff do make Execution on Where
Fieri fac' tho' he never return the *Fieri fac'*, yet there needs
 the Execution is good. *Aliter in Elegit. Vid. infra,* no Return
 And if the Sheriff levy the Money and give it on *Fieri*
 the Plaintiff, tho' he never make any Return to *fac'.*
 the Court, it is good enough. 4 *Rep. 64. Full-*
woods Case, and p. 90. Hoes Case.

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The Bayliff of the *Savoy* levied Goods, and yet Return *nulla bona* on Attachment, and for cause saith, that on *V.* at the time of the Execution shewed a Bill of Sale on good consideration, whereby if he executed, he was liable to an Action: and therefore, without Security to save him harmless, he refused to make any other Return; which the Court agreed, and ordered the Money to be brought into Court, and as the Trial goes between the Sheriff and *V.* the return to be amended or not, 1 *Keb.* 901.

Security to
the Sheriff.

Upon a *Fieri fac'*, the Sheriff returneth *qd' nihil habet*, this is not good without saying further, *nec habuit post receptionem brevis*, 39 H. 6. *Fitz. Ret.* 30.

Ret' quod
Clericus est
beneficiatus

On Recovery of Debt on *Fieri fac'* directed to the Sheriff of *London*, he returned *qd' Clericus est beneficiatus in Ely*. The Court conceived this return improper, in regard there should have been a suggestion on the Roll, after the return made by the Sheriff of *London*, that the Defendant had Goods in *Ely*, and that the Sheriff of that County should have made this Return of *Clericus beneficiatus*. Now if the Sheriff of *London* return *nulla bona*, but that he is *Clericus beneficiatus in Ely*, thereupon went a *Fieri fac'* to the Bishop of *Ely* on a *Testatum*, and he returned that he had *nulla bona Ecclesiastica*; this return by some is not good, but he ought to Return a Sequestration, having admitted him to be *Clericus beneficiatus*; but he is not estopped to say, that he is not *Clericus beneficiatus* by the Return of the Sheriff. The Court agreed, the *Fieri fac'* well directed to the Bishop and not to the Sheriff, but they conceived it a good Return, and if it be false the Plaintiff may have his Action on the Case, 1 *Keb.* 497. 2 *Keb.* 83. *Picard and Payton*.

On a Statute, if the Sheriff return *quod est Clericus beneficiatus nullum habens Laicum feodum nec bona nec catalla*, but that he is *beneficiatus* in such a Diocese, then a Writ of Sequestration shall go to the Bishop to Sequester the Profits, and to deliver them to the Conisee until he be satisfied, 2 Rolls Abridgm. 474. Pope and Baurtree.

If there be false Return on a *Fieri fac.*, the remedy is by Action on the Case. In a *Fieri fac.* to the Sheriffs of London, they Return *nulla bona*, but that he is *Clericus beneficiatus* in Ely; upon which a Writ issues to the Bishop of Ely, and he returns *nulla bona Ecclesiastica*: If it be so that he hath a Spiritual living, the Plaintiff may have Action on the Case against the Bishop, *Siderfin* p. 276.

The Party may aver the value of the Goods greater than the Return, but the Sheriff is Estopped, 2 Keb. 789, 811.

Return of a Fieri facias.

Virtute istius brevis Fieri feci de bonis & catallis terris & tenementis infranominat' R. B. ad valentiam 200 l. & illa de die in diem venditioni exposui & inde vendidi ad valentiam 100 l. Quas quidem centum libras ad diem & locum infra Constat' parat' habeo ad reddend' infranominat' J. W. prout interius mihi precipitur, & resid' bonorum & catallorum predict' adhuc penes me remanens invendis' ob defect' emptorum.

Virtute istius brevis cepi bona & catalla A. W. infraſcripti ad valentiam omnium denariorum infraſcripti. Et illa venditioni expoſui ad quod nondum inveni emptores. Et ideo denarios infraſpecificari habere non poſſum ad diem & locum infraſcriptum, prout mihi præcipitur.

Other Forms of Retorns, *vid. Dalton, cap. 61.*

Of Reſtitution to Lands or Goods ſeiſed by the Sheriff, after Reverſal of the Judgment, in what Caſes it ſhall be, and in what not.

If a man recover Damages, and had Execution by *Fieri fac'*, and upon a *Fieri fac'* the Sheriff ſells the Term for years to a Stranger, and after the Judgment is Reversed, he ſhall only be reſtored to the Moneys for which the Term was ſold, which was by default of the party, and not to the Term it ſelf; becauſe the Sheriff had ſold this by Command of the Writ of *Fieri fac'*, *Dyer 363. 8 Rep. 143. Dr. Drury's Caſe, 19. b. Matthew Manning's Caſe, 5 Rep. 90. b. Hor's Caſe.*

So if the Goods of a man Outlawed be ſold by the Sheriff upon a *Cap. Utlagat.* and after the Outlawry is Reversed by Writ of Error, he ſhall be reſtored to the Goods themſelves; becauſe the Sheriff was not compellable to ſell theſe Goods, but only to keep them for the uſe of the King, *5 Rep. 90. Hoe's Caſe.*

But upon *Fieri fac'* he ſhall have Reſtitution only to the value :

1. Elſe none would buy.

2. By

2. By *Fieri fac'* the Sheriff is compellable to levy the Debt upon the Goods: One is *compulsio*, the other *voluntaria*, 8 Rep. 143. Dr. Drury's Case,

If a man recover Damages, (as suppose in a Writ of Covenant) against B. and had *Elegit* of his Chattels, and of the moiety of his Lands; and the Sheriff upon this Writ delivers a Lease for years of Land which B. had, to the value of 50 l. part of the Sum recovered, and after B. Reverseth the Judgment; he shall be restored to the Term it self, and not to the Value. For tho' the Sheriff might have sold the Term upon this Writ; yet here is not any Vendition to a Stranger, but a delivery of a Term to the party who recovers, by way of Extent without any Sale, and therefore the Owner shall be restored: For the Sheriff is not bound by this Writ to sell the Term, as he is in a *Fieri fac'*, Pasch. 16 Car. B.R. *Buckburst and Mayo*.

Quere, For this is a Sale; all the Term being delivered to the party according to the value in gross, and not annual, 1 Roll. Abr. 778.

So if Personal Goods were delivered to the party *per rationabile pretium & extentum*, upon Reversal of the Judgment he shall be restored to the Goods themselves for the same Reason.

Lessee for 99 years, by his Will devised his Lease in these words; (*viz.*) *I devise my Lease to my Wife during her Life, and after her death, I will, that it go to her Children unpreferred; and made his Wife Executrix and dyed. The Wife entred and married with J. S. and afterwards for 140 l. Debt recovered against J. S. on a Fieri fac' the Term was sold by the Sheriff, and afterwards the Judgment was reversed by Writ of Error, and awarded, quod omnia quae*

The Office and Duty of Sheriffs, &c.

amisi ratione judicii restituantur. The Wife (the Executrix) died. And *per Cur'* These Points were Resolved :

1. The Executory Devise of the Lease after the death of his Wife to the Daughter (Unpreferred) was good.

2. That the Sale made by the Sheriff upon the *Scire fac'*, did not destroy the Executory Devise.

3. That sale made of the Term by the Sheriff stood good, altho' the Judgment was Reversed ; and the Plaintiff (the Daughter) shall be restored to the value of the Term, but not to the Term it self; and yet the Vendee had an absolute property in the Term during the Life of the Wife, *Mich. 27 El. B. R. Amner and Lodington, 8 Rep. 96. Manning's Case.*

A Judgment in *D.* being Reversed in *B. R.* a Writ of *Restitution* was awarded, and to enquire what were the Profits of the Land recovered *a tempore judicii*; (*videlicet*) *7 Aug. 19 Jac.* And the Inquisition returned, That they amounted to 10*l.* *Per Cur'*, The Writ is ill; for it ought not to have been, what the profits of the Land amounted unto from the Judgment. For the Plaintiff is not to answer the Profits longer than from the time of the Execution sued. Then there was a new Writ of *Restitution*, which was, What profits of the Land the Plaintiff (who recovered) had taken *colore judicii prædicti*, which was *2 Aug. 19 Jac.* and after the Reversal thereof, *Cro. Jac. 698. Symson and Juxon.*

Form of the Return.

J G. & alii infranominat' nihil habent nec eorum aliquis nihil habet in balliva mea, unde restitutio honorum & catall' infrascript' infranominat' W.M. habere facere potui: Necnon 24l. infrascript' eidem W.M. fieri facere potui prout, &c.

Virtute istius brevis mibi direct' (tali die & anno infrascript') venement' infrascript' cum pertin' re-seisfri & infra-nominat' T. & H. plenam possession' & seisinam inde restitui prout interius mibi præcipitur.

Of the Sheriffs selling a Term for years taken in Execution, and when such Sale shall be good, and when not.

For the understanding how the Law is in this Point, you must observe a diversity between the sale of a Term on a *Fieri fac'*, and Extent on an *Elegit*; for the *Elegit* is, *Quod per Sacramentum XII. proborum, &c. per rationabile pretium & extentum*, That they Appraise the Goods and Chattels of the Debtor, and extend his Lands; and therefore if they are not Appraised by the Jurors, he cannot sell them, (as *Dyer* fo. 100. and so is *5 Rep. Palmer's Case*.) Execution by *Elegit* ought to be *per Inquisitionem per Stat. W.2. c.18.* which saith, (*per rationabile pretium*) which extends to Chattels, and *per extentum*, which refers to Lands. In *Elegit* the Goods are to be delivered to the party *per rationabile pretium*; but in *Fieri fac'* the Sheriff must sell the Goods, *1 Keb. 566. Glaswell and Morgan.*

Where it shall be in the Election of the Sheriff upon *Fieri fac.* to him directed to sell a Term, or deliver it on Extent.

Distin-
between
the Extent
of a Term
on *Elegit*,
and Sale
by *Fi. fa.*

Recital of
a Term in
the Sale of
it.

In *Elegit* the Term may not be extended without shewing the certainty of the Commencement; for after the Debt satisfied the party is to have his Term and Remainder. But upon *Fieri fac'* the Sheriff may sell, and his Return is general, *quod fieri feci de bonis & catallis*, 5 Rep. Palmer's Case.

Now the Sheriff is to be careful in the sale of a Term on *Elegit*, if he make particular Recital, that there be no mistake. But a general Recital is better: As,

In *Ejectment* it was found by Special Verdict, that the Sheriff upon an *Elegit* impannelled a Jury, who found that the Defendant was possessed of a Lease for 100 years, which began at Mich. 2 & 3 of Pb. & M. *ubi revera*, as it was found it began Mich. 3 & 4 of Pb. & M. *cujus quidem H. statum interesse & terminum in tenementis prædictis prædict. Juratores appretiarunt ad 80 l.* and the Sheriff sold it to the Lessor of the Plaintiff for 80 l.

Now the Inquest found one thing, and he sells another (as this Case was,) and the Sale not being warranted by the Inquest is void. But had the Inquest found he had been possessed of such Land generally for the Term of divers years to come, and they had Appraised it for so much, without shewing the certain beginning or determination, it had been well enough, for they shall not be compelled to find a Certainty, not having means to be informed thereof; or if the Sheriff sells all such Interest which the Defendant had in the same Term, the Sale had been good, 5 Rep. Palmer's Case.

So is Sir G. Sidenham's Case in B. R. The Inquest on a *Fieri fac'* found that the Defendant was possessed of such a Term, and mistook the Date, and the Sheriff sold it; the Sale was not good;

good. And on the New *Fieri fac'* the Court directed that it should be found, That he was possessor of a Lease for years generally, and yet continuing, and that he sold it, *Cro. El.* 584. *Palmer's Case*, 4 *Rep.* 74. *mesme Case*.

W. and his Wife possessed of a Term in right of the Wife, as Administratrix to *C. W.* being indebted, granted it to *B.* to the use of *W.* and his Wife for their Lives, and afterwards to the use of *B.* himself. *W.* is sued for this Debt, and Recovery against him, and a *Fieri facias* being awarded to the Sheriff, he for this Debt of *W.* sold the Term to the Plaintiff. *Per Cur'*. This Grant of the Term to the use of the Grantor himself is not void *per Stat.* 1 *H.* 7. for this Grant is not to avoid Creditors: For the Term being in right of the Wife as Administratrix, and if it had so continued in the hands of *W.* and had never been granted, this was not extendible for the Debt of *W.* and if *W.* had it as Executor himself, it was not extendible for his proper Debt, and Fraud shall not be intended except expressly found; therefore the Sale is good, *Cro. El.* 291. *Ridler and Punter*.

Baron and Feme.

What Term not extendible.

Fraud not to be intended.

W. had Execution out of the Kings-Bench by *Scire facias*, of a Term, which was sold by the Bayliff of a Liberty. After, upon another Judgment the Bayliff delivers this Term to another, pretending that the first Judgment and Execution was fraudulent. But *per Cur'* it is not well done; for he is not a Judge of Fraud, and the Court will not allow such pretence to Sheriffs and Officers, *Latch.* p. 53. *Warrington's Case*.

Officer first sells on one Judgment and delivers upon another, pretending the first Judgment was fraudulent. The Sale shall bind the King.

If the Sheriff extend or sell a Lease, this Sale shall bind the King (as to his Debt,) because it is but a Chattel, and there was no Covin, 8 *Rep.* 171. *Sir Gerrard Fleetwood*.

Upon

Sell the
Wifes
Term for
the Debt
of the
Baron.

Upon an Execution against the Husband for his Debt, the Sheriff may sell the Wives Term during her Life, *Co. Lit.* 351. a.

The Form of a Return of *Fieri feci* on a *Fieri faciat*. *Vide Dalt.* c. 61.

Whether a Fieri fac' upon a Judgment in the Kings Bench shall go into Wales.

Plaintiff recovers a Debt against the Testator in *B.R.* the Action was laid in *London*; and after the Death of the Testator the Plaintiff after Judgment in *Scire fac'* sues a *Fieri fac'* at *London*, upon which the Sheriff returns *nulla bona*, by which he sues a *Testatum fieri fac'* to the Sheriff of *Montgomery* in *Wales*, directed to levy the Moneys recovered *de bonis Testatoris in manibus Executoris*. Upon which Writ the Sheriff Returns this:

EGO C. L. Baronet', Vic. infra-mentionat' Comit' Montgomery domini Regi humillime Certifico quod infra specificat' Comitatus Montgomery est un' duodecim Comitatus infra Principalitatus sive Dominium dicti Dom' Regis Wallie ubi Breve Domini Regis ipsum regem minime tangen' non currit, quodque non patet per istud breve quod idem breve dictum Dom' regem ullo modo tangat, unde advisamenti Curie dicti Dom' Regis coram ipso Rege humillime implero si mandatum istius brevis exequi poterim.

C. L. Baronet, Vic'.

Sheriff not
to dispute
the Juris-
diction of
the Court.

The Sheriff on this Return was amerced, and that the Plaintiff should have a new Writ. For the Sheriff by his Return ought not to dispute the Jurisdiction of the Court, to which he is a Minister: But if the Court erroneously award
Process

Process which was not to be awarded; the Sheriff ought to obey and execute it; but the party grieved may shew this Matter to the Court, and pray that they will supersede their Erroneous Process, and so have remedy.

But as to the Question, *vid. 2 Sand. 194. Draper and Blaney, 2 Keb. 657. Draper's Case 715.*

Elegit lies into Wales, and so doth Execution on a Statute Merchant, and that *breve Dom. Regis non currit in Walliam*, is intended of Originals, not on Judicials, *3 Keb. 170. Witrong and Blaney, 1 Bulstr. 54. Hall and Rotheram, Cro. Jac. 484.*

A *Capias* on a *Fieri fac'* lieth into Wales; *2 Keb. 715.*

It was the Opinion formerly, that a *Fieri fac'* on Original Judgment in *B. R.* doth not lye into Chester, *Wales, &c.* but as *Dyer*, the Court shall send the Record and Writ thither. And in Action of Debt there it may be; but its granted every day into *Lancaster, Wales, &c.* *2 Keb. 410. The King versus Needham and Bennet.*

A Writ of Execution goes into *Wales*, and *27 H. 8. c. 26.* makes this plain; for by it *Wales* and *England* are annexed, *Plowd. fo. 200. Stradling and Morgan.*

C H A P. XVIII.

How the Sheriff is to demean himself in giving Possession and Seisin upon the Writs of Habere fac possessionem or Seisinam. As to the manner of doing, or the return of a Superfedeas. Where it shall stay the Sale of Lands or Goods, or not. What amounts to a Superfedeas. Where and when a Writ of Error is a Superfedeas. Of Audita Querela.

The Sheriff
to make
Execution
of the
thing at
his peril.

Diversity.

IN all Cases where the Execution of a Judgment, in which the Demand is of a thing certain; If the Sheriff do this thing, he is not any Disseisor. But where the Execution is in the generalty, without mentioning of any thing in particular, there the Sheriff ought to make Execution of the right thing at his own peril, otherwise he shall be a Disseisor; for he is bound to take notice of it, and he had not any Warrant from the Court to make Execution of any but the right thing. As if a man recover in Assize divers Houses, and after the Tenant reverseth it in a Writ of Error, and a Writ of Execution issues to the Sheriff, to put him in possession of the Houses which he had lost by the Judgment, altho' the Tertenants are Strangers to the Recovery, and for this they ought not to be ousted without *Scire facias* against them; yet if he do Execution by putting them in possession by force of this Writ, he shall not be any Disseisor, for that he hath the direct Authority of the Court to do it, *Pasch. 15 Jac. Floyd and Bethel.*

So

So in Judgment for the Casual Ejector for 47 Houses, and on *Habere facias possessionem* the Sheriff turns out these 47 Tenants, and 80 other Tenants, without any Process or Plea against them. *Per Cur'*. We will not grant any Writ to supersede the Execution against the 80 Tenants; for if it should be, it ought to be *quia erronee*, and there was not any Error in the proceedings against them, because there was not any proceedings. But they did Advise, that every one should bring *Trespas* against the Sheriff, 2 *Siderfin* 155.

Trespas against the Sheriff for wrong executing Possession.

If the Sheriff do deliver possession of more Acres than are in the Writ, this makes not the Writ erroneous; but in such case Action on the Case lies against the Sheriff for doing it; or an Assize against him that hath the possession delivered to him for the Surplusage of the Land. But if the Writ of *Hab. fac. possell.* to deliver possession to the Plaintiff of Lands recovered by him in *Ejectment*, contains more Acres of Land than were in the Declaration, the Writ is erroneous, *Pract. Reg.* 131, 132.

Case against the Sheriff for delivering more Acres than are in the Writ. Diversity.

Trespas lies against the Sheriff, if he does not execute on the right places, 1 *Keb.* 278. *Lufston's* Case.

Execution must be done in the right places.

If a man bring *Ejectione firmæ* of 40 Acres of Land and recovers 30, and not the residue; upon the Writ of *Execution* the Sheriff may deliver to him any, (*viz.*) three or more in the Name of all, without setting out the Land recovered by Metes and Bounds, altho' the Plaintiff had not recovered all the Acres whereof he had brought this Action, and whereof he had supposed the Defendant Tenant. But if a man be to be put in possession of divers Messuages upon a Writ of *Execution*, and the Houses are in possession of several men, he ought to go to every House particu-

Where possession of some in the Name of all, good or not.

particularly, and to deliver Seisin of it, and the delivery of Seisin of one in the name of all is not sufficient; for he ought to deliver *plenariam Seisinam*, *Trin. 15 Jac. Floyd and Betbell's Case.*

In what
Case the
Plaintiff
is to shew
to the
Sheriff
what part
the Jury
intended.

In *Formedon* on Non-tenure of three Messuages the Jury found he was Tenant of one of the Messuages, and not of the other; the Plaintiff may have Judgment, and a Writ to the Sheriff to deliver Seisin: And the Plaintiff at his peril is to shew to the Sheriff what Messuage it was the Jury did intend; for the Jury is not tyed to set Bounds to it, *Cro. Eliz. 256. Striven and Prince.*

Acres that
are to be
delivered,
must be
according
to the U-
sage of the
Country.
Of Rent or
Common.
Seisin of
Rent or
Common
by Parol.

If a Writ of *Execution* goes to the Sheriff, to put a man in possession of 20 Acres of Land, the Sheriff ought to give him 20 Acres in quantity, according to the Usage of the Country where it lies, and not according to the Statute, *Floyd and Betbel.*

If a man recover Rent or Common, upon which a Writ issues to the Sheriff to put him in possession, and the Sheriff comes upon the Land, and delivers to him seisin of the Rent or Common by Parol, that is well made, and the Recoveror is in actual possession of this, 22 *Affize* 84.

Riotous
possession
by Under-
sheriff,
Attorney
in C. B.
not to be
enquired
of by B.R.
without
Informa-
tion.

If the Under-Sheriff delivers Possession riotously on Extent on a Statute Merchant, and the Sheriff refuseth to Return any Jury to enquire of the Force, and he was an Attorney of the Common-Pleas, the Court of Kings-Bench, unless the Cause were depending, cannot take notice of the Offence without an Information, 2 *Keb.* 541. *Morgatroyd versus Peebles, Vid. Mo. 781, & 462.*

Where shall be a New Execution or not, and of the Sheriff's Return on this Writ.

The Recoveror is put in possession by *Habere fac. possessionem*, and the Defendant ousts him again; What remedy?

In 2 *Brownl. p. 216. Stile's Case* in B. R. by *Williams*, he cannot have a New Writ of Execution, but is put to his New Action, and the filing of the Writ is not material; for it is within the Election of the Sheriff, whether he will file or return it, or not. But if the Execution had not been fully made, as in the Execution of an House, some hid themselves in the upper Rooms, and when the Sheriff was gone they came down and ousted those that the Sheriff had put in possession before; in such a Case a New Writ of Execution was awarded. By the Chief Justice, In this Case of Re-entry the Court may award an Attachment against him, for Contempt against the Court.

After Possession and Ouster what remedy. New Execution. Return.

But in *Peirson and Taverner's Case*, the Recoveror is put in possession by *Hab. fac. possess.* and the Defendant ousts him again; if the Writ be not Returned, the Plaintiff shall have a New Return. *Hab. fac. possess. 1 Roll. Rep. 353.*

And if *Hab. fac. seisinam* be executed, it is good without Return; yet the Court may command the Sheriff to Return it, 1 *Roll. Rep. 77.*

On *Habere fac. (seisinam)* the Sheriff cannot Return, That another is Tenant of the Land by Right, for that cannot come in Issue between the Demandant and him, and therefore he ought to execute the Writ, 6 *Rep. 52. Boswell's Case.*

Upon

Return.

Upon *Habere fac. possess.* the Sheriff returned, That in the execution of the said Writ he came to the House recovered, and removed out all the persons he could find, and delivered to the Plaintiff possession and departed; and soon after Three persons secretly Lodged in the House expelled the Plaintiff: On Notice whereof he returned again to the House to put the Plaintiff in full possession; but the others resisted him, so that without peril of his Life he could not do it, 1 Leon. pag. 145. Upton and Wells.

New Hab.
fac. possess.

On this Return the Court awarded a New Execution. A Writ of *Habere fac. possess.* was directed to the Sheriff; a Writ of Error was brought, and a *Superfedeas* granted, directed to the Sheriff to stay Execution: And the *Superfedeas* was shewed to the Sheriff as he was going to do Execution; yet he refused to obey it, and did Execution notwithstanding. This is a great Contempt in the Sheriff, and the Court ordered a Writ of *Restitution* to be granted, 2 Bulstr. 194. Thomas and Owen.

Execution
by the
Sheriff
after a
Superfedeas.

Return of *Habere fac. possessionem.*

Virtute istius brevis mibi directi Justiciarius
infra scripti Habere feci (quod tali die & anno
infra scripti) Habere feci A. G. plenam seisinam de
un' Messuag' cum pertin' in S. infra specific' in omni-
bus prout istud breve exigit & requirit.

Note, The Sheriff in Cases where Land is recovered, is to put the party in possession and seisin by a Twig, Clod, &c. of an House by the Key, &c. of Rent by Corn or Grass, growing on the Land, out of which the Rent Issues. 6. Rep 52.

It is no good Return, that another is Tenant of the Land by right, or that he has nothing in the Land.

Seisin of the Land in one Vill in the name of all the Lands in 3 Villis, is good.

Return of Habere fac. possessionem.

Virtute assise brevis mihi direct. 24. die Maij Annot. infrascript. habere feci infra nominat. H. H. possessionem termini sui infrascript. de tenementis infrascript. cum pertin. prout antea mihi precipitur. Dalt. c. 63.

Infra nominat. R. B. Miles nulla habet bona seu catalla terras aut tenementa in Ballia. minime denar. infrascript. Fieri facere possum prout antea mihi precipitur.

Of Superfedeas.

If the Roll be marked for a Writ of Error before Execution done, the Sheriff shall be excused for doing it before a Superfedeas delivered, but this is sufficient to supersede the Execution. 1 Keb. 12. If a Writ of Error be brought, and shewed to the Attorney, if Execution proceed, a Superfedeas quia erronea may go. But in Noel's Case. 2 Keb. p. 33. Error brought and shewed to the Attorney, is no good Superfedeas, till it be shewed to the Clerk of the Errors.

Till the Roll Marked, or the Writ delivered unto the Officer in Court, Writ of Error is no Superfedeas, especially after the Return of it. 3 Keb. 171.

The party ought to take notice of a Recipitur upon the Record if it be Entred, and if the party take not out Execution after the Writ of Error allowed, it is a Contempt, else not; and the Attorney is not bound to view the Record, if a

Writ of Error be brought, but may take out Execution, if there be not a *Superfedeas*, or notice given to the party. *Stiles Rep.* 105. *Winn and Stubbins*: It is the duty of the Clerk of the Errors to mark the Roll and not the Attorney. *Stiles Rep.* 159. *Mercer and Rule*. A Writ of Error is duly pursued, tho' the Roll be not marked, and if neither the Roll be marked nor notice given to the Attorney of the other side of the bringing the Writ of Error, if the party proceed to take out Execution it is no Contempt to the Court.

Where and when a Writ of Error is a *Superfed.* or not.

Marking the Roll, paying Fees for, or allowance by the Chief Justice of a Writ of Error is no *Superfedeas*, unless actually taken out before Execution, *per Tawfden*. Error brought and shewed to the Attorney, is no *Superfedeas* until it be shewed to the Clerk of the Errors, which is an Allowance in Court, and therefore if Execution be done before it be allowed by the Judge, or shewed to the Clerk of the Errors, it is well done, because the Attorney otherwise would never have it allowed, but only shewed to the Attorney of the other side; but if he shew it, and declare his Intention to have it speedily allowed, there Execution is superseded in the mean time, but yet if Bayl be not given according to the *Statute*, the Execution may be well done, which the Court agreed in *Keb. 33. Noel's Case*.

Formerly (*per Hales*), if Execution were gone out before a Writ of Error delivered, or shewed to the party, it was not to be a *Superfedeas*, and by him it shall not be a *Superfedeas*, unless shewed to the party, and must not foreclose his time in having it allowed, for if it be not allowed by the Court within four days it is no *Superfedeas*, and a Writ of Error taken out, if it be not shewed to the Clerk of the other side and allowed by the

the Court, it is no *Superfedeas* to the Execution.

Mod. Rep. 112.

The Sheriff makes his Warrant to a Bayliff to take the Body of &c. Upon a *Ca. Sa.* and before the Warrant executed, the Sheriff receives a *Superfedeas*, and the Bayliff having no notice proceeds; yet the Arrest is not lawful, but the Bayliff is excusable in Trespas. *Moor* p. 677.

Prince and Allington.

One purchaseth a *Superfedeas*, and doth not deliver it to the Sheriff till after the fourth County day, and then he is Outlawed, yet the Outlawry is void. *Moor. n.* 73. *Ca. sa.* was delivered to the Sheriff of *E.* at 11 Clock, and a Warrant thereupon made to the Bayliffs, 4 hours after a *Superfedeas* comes to the Sheriff, and a Warrant upon this *Superfedeas* delivered to the Goaler to set the parties at liberty if they were Prisoners, who upon it were discharged. *Per. Cur.* the Sheriff hath done well, being the same day; *Lit. Rep.* 296. *Porter and Corbet.*

Fi. Fac' to the Sheriff to Levy the Debt, and the Defendant brought Error, and had a *Superfedeas*; so much Mony as the Sheriff had received before, shall go to satisfaction, and a *Venditioni exponas* shall issue upon it. *Tel. p.* 6. *Tocock and Honeyman.*

Superfedeas, as to Goods seized is a *Superfedeas* as to Sale; but if the Sheriff hath received the Mony he must return it into Court, 3 *Keb.* 174 *Mud and Warren*; and it is not discharged by the *Superfedeas*. And the case was, a *Superfedeas* came before Execution, but in truth after Goods seized and before Goods sold, but after the Sheriff had taken security for the Mony, and discharged the Execution; Sheriff returns that he had received a *Superfedeas* out of Chancery in the nature of an *Aud. Querela*, It is not good, because the Record was

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not there 1 *Rol. Abridg.* 383. *Merston and Man-
nory.*

A *Certiorari* delivered to the Justices of the Peace after Restitution awarded, and before it be executed by the Sheriff, is not a *Superfedeas* to the Sheriff, unless the Justices make a *Superfedeas* upon it, which if they do not, they are fineable for the Contempt. *Mo. Rep.* 673.

Note, By the *Stat.* 16. and 17. *Car. 2. c. 8.* All stays of Execution by *Superfedeas* on *Writs* of Error after *Verdict*, are taken away; but the other remains as they did.

*Aud. Quer. on escape where it lies or not, or upon o-
ther Execution by the Sheriff, not well made and
delivered.*

Vide infra sub titulo, where the Escape of one shall be a discharge of the other, or not.

Audita Querela, is an Equitable Writ, and not to be allowed without Equity.

If one in Execution escape of his own wrong, he shall never have *Audita Querela* to discharge himself; and the Goaler may retake him; but if he escape with the consent of the Goaler the Goaler cannot take him again, and if he do, the party shall have an *Audita Querela*. *Cro. Car.* 240. *Robinsons Case*, 1 *Rol. Abridg.* 307. *Trevillian* and the Lord. *Roberts.*

So if the Sheriff Arrests one in Execution, and doth not return the Writ, but suffers him to escape, and upon the *alias Capias*, he Arrests him again, *Audita Querela* lies. *Mo.* 57. n. 163.

But where two were bound jointly and severally, one was condemned and taken in Execution, after the other was sued, condemned and taken, the first escapes, the other shall not have *Audita*

Querela

Querela, for there must be satisfaction in part.
5. Rep. 67. *Blomfield's Case*.

A word that is surplusage, shall not avoid this Writ, as in *Arundel's Case*: The *Audita Querela* comprehended, that *M.* had recovered against the Plaintiff in Debt, and that he was taken by *Cap. ad satisfaciend.* at the Suit of *M.* by the Sheriff of *G.* who let him go at Large, and on Issue upon the voluntary escape it was found for the Plaintiff. And it was moved, that the Writ of *Audita Querela* was not good, for the words are, that the Plaintiff *cap. fuit virtute brevis nostri judicialis*, and this word *judicialis* is not in the Register, but only *brevis nostri de Capiendo*, yet adjudged good. 1 Leon. 73 *Arundell and Morris*.

Audita Querela on escape of the Testators Creditor, and recovery against the Marshal. Defendant *protestando*, that the Plaintiff escaped after the Defendant recovered against the Marshal, and the Plaintiff did not pay the Marshal, *absque hoc* that the Marshal satisfied and paid the Testator. This case differs from all others of escape by consent of the Gaoler, this being not purely Debt which goes over to Executors, but is grounded on a Tort general by the death of the Gaoler; the Court concluded, that recovery against non payment to the Marshal, was no discharge of the Plaintiff in this *Audita Querela*. But *Adjournatur*, to take Issue on payment by the Marshal to the Creditor, viz. the Defendants Testator 3 Keb. 763. *Gardner and Sedgwick*.

One was Outlawed in Debt, and taken upon the *Capias* and committed to the Fleet, and the Warden suffered him to go at Large voluntarily, and after the Executor of the Plaintiff in Debt, takes him in Execution again upon a new Writ, and upon this he brought *Audita Querela*, and

Outlawry.
Pleaded to
Audita Querela
where 'tis
good, or
not

shews this matter, and Outlawry in the Plaintiff in the *Audita Querela* was pleaded, *Per Cur.* it is a good Plea, because this Writ is not directly to Reverse the Outlawry (as Error is) but is founded upon a Tort (*scil.*) upon the Escape, and not upon the Record only, *aliter* in Error or Attaind. Outlawry is no Plea; nor is there any difference as to this Case, where the Outlawry is at the Suit of the Defendant or of a Stranger. *Vid.* other good reasons *Sider.* 43. *Jason*, and *Kete*.

If upon *Elegit*, the Sheriff takes an Inquisition, and there are found several Lands subject to the extent, and found of the several values; and the Sheriff Returns he had delivered some of the said Lands in Particular for the Moieties, where it appears, that according to the values found an equal Moieties is not delivered to the party who recovers, but more than a Moiety; this is not void, neither is it a Disseisin by the Entry, but only voydable by an *Audita Querela*. *Fr.* 15. *Cur.* 1. *B. R. Rowe* and *Weeks*.

If *A.* recover against *B.* Debt or Damages, and *Elegit* is granted to the Sheriff to extend the Moiety of his Land, which is ancient Demesns, altho it be admitted, that this is not extendible, yet *B.* may not avoid this by Entry, without *Audita Querela*, because the Sheriff had a Warrant to deliver the Moiety of half his Land, and this was his Land, *Ergo* not void. *Hob. p. Cox* and *Barnaby*.

C A P. XIX. *Of Elegits, and the Sberiffs Duty therein, and of the Retorns thereof. The difference of it, as to Lands and Goods, how to be managed by the Sberiff about it may be well executed, and what thing may be executed or not. Of the Inquisition, Retorns of Elegit, how to be made. Where a new Elegit shall be had or not. Of extent by the Bayliff of a Liberty. The Sberiffs Office about Execution for the Kings Debt; of Stat. Merchant, Staple, Recognizance: The difference of the Retorns. Retorns of Scire fac. the Sberiffs demeaner as to Outlaries, and Capias Utlagatum, and the Retorns*

Of Elegits, &c.

Elegit is a Judicial Writ given by the Stat. *The nature of an Elegit, as to Lands or goods.* *WV.2. c. 18.* either upon a Recovery for Debt or Damage, or upon a Recognizance in any Court. By this Writ the Sheriff shall deliver to the Plaintiff, *omnia catalla debitoris (exceptis boibus & afris Carucæ) medietatem terrarum*, and this must be done by Inquest taken by the Sheriff, for the valuation of the Goods, and Lands ought to be first found by the Inquisition of a Jury. *WV.2. c. 18.* gives the Elegit, so that in Elegit the Sheriff may take in Execution the Moiety of the Lands of the Conizor, &c. and all his Goods and Chattels, (except as aforesaid) and was to deliver them to the Conisee, or he who recovers upon a reasonable extent or price, until the Debt be satisfied, and the Sheriff shall deliver him the Scisin of the Land, and he is called Tenant by Elegit, and shall do no VVaste. *4 Rep. 47.*

The Office and Duty of Sheriff, &c.

The *Elegit* as to Goods, is in effect but a *Fieri fac.* and therefore if there be no Lands, and Execution be upon Goods, and they are not sufficient, he may have a *Capias*; *aliter* if Lands be extended.

If one prays to have *Elegit*, and the Sheriff Returns he has no Lands, and he prayed a *Capias*, but the Court granted it not; the cause is, the Entry in the Roll is, that he hath chosen the Execution of the Moieties of the Lands which he must stand to, 30. *Ed.* 3. But the Law now is not so, for if the Sheriff return *Nihil*, the party may have a *Capias*, *Hob.* 57.

Elegit, how to be managed by the Sheriff, that so it may be well Extended, and what things may be executed or not.

As to what things may be extended or not, you must know.

Leases for
Years.

All the Goods and Chattels, in which are included Leases for Years, shall be extended, (except Oxen and Beasts of the Plow) the Moieties of the Lands. *Vid. infra*, how it shall be done.

A Rent seck.

A Rent seck, where there is not any Reversion cannot be delivered *ut liberum Tenementum*. *Cro. Eliz.* 656. *VValshal* and *Heath*.

Annuity.

Annuity Certain is extendible by *Elegit*. *Cro. Jac.* 78. *York* and *Twine*.

Anc. demesne.

Lands in Ancient Demesne may be delivered in Execution by the Sheriff by force of an *Elegit* out of the Kings Court, for the Land it self was never put in plea directly in the Kings Court. 5. *Rep. Aldens Case*; *Hob.* 47. *Cox* and *Barneby*.

*Vid. the
Million
Acc.*

If the Lands descend to an Infant, the Sheriff shall cease to extend.

As

As to the Inquisition,

Note, If the Inquisition in *Elegit* be void in Inquisition any part, its void in the whole, and the whole void in must be quasit; and not *quoad* that only; so if any part, more than a Moiety be delivered on the *Elegit*, void in the it is void for the whole, 2 *Keb.* 582. *Harris's Case*, whole. *Siderfin* p. 91. *Berry and Wheeler*.

It was moved in the said Case of *Harris* to quash an Inquisition of *Elegit* upon Judgment in B.R. because it appears not in what County the Lands extended were; but *Monmouth* being in the Margent, and directed to the Sheriff there, and the Return made by him, it shall be intended in *Monmouth*, 2 *Keb.* 582.

Upon a Writ of *Extendi facias* upon a Statute, The Jury if the Sheriff Impannel a Jury, and they deliver cannot the Verdict to the Sheriff in Writing, they may alter a after make it more formal, but cannot alter it Verdict in in substance; for it is a compleat Verdict by substance. delivery of it to the Sheriff, 2 *Roll. Abridgm.* 712. *D'albie's Case*.

Elegit recites the Judgment, *quod Elegit executionem* of the moiety of the Goods, and of the *Elegit* Lands; and the Writ was, *Ideo tibi precipimus* vitious upon Omission. *quod bona & catalla* of the Defendants, *quae* *habuit die judicii predicti redditu deliberari fac*, omitting these words, *& medietatem terrarum & tenementorum predicti tenend* the said Goods and moiety of the Lands; *Quousque debitum levatur*, by virtue whereof the Sheriff delivered the Moiety in Execution. *Per. Cur'* This shall not be amended, and he ought to Amend- have a new *Elegit*; because the Inquisition ment. was taken without Warrant, the Sheriff New *Elegit*. having no Warrant to extend those Lands, *Cro. Car.* 162. *Walsall and Riches*.

Two Inquisitions no one Stat. Merchant.

Two Inquisitions taken at several days by several Juries upon one Statute-Merchant, were adjudged naught; one was taken of the Land, and the other for the Lands and Goods, *1 Brownl.* 38.

The Sheriff not to deliver the Lease at another value, than the Jury find it.

Lessee had a Lease of the value of 100 *l.* and after the *Teste* of the *Elegit*, and before the Sheriff had executed the *Elegit*, assigns his Term to one, who assigns it over to the Plaintiff in the *Scire fac'*; and afterwards the Sheriff executes the *Elegit*, and delivers the Lease to the Plaintiff, *Tenend'*, &c. for the satisfaction of the Debt, which came but to 43 *l.* 6 *s.* 8 *d.* *Per Cur.* The Sheriff could not deliver the Lease at another value than what the Jury had found it at. And

Sale by the Sheriff, as strong as in open Market.

the Sale made by the Sheriff is as strong as if it had been made in open Market, and all the Goods and Chattels are bound after the *Teste* of the *Elegit*, and cannot be sold by the Owner after, *1 Brownlow* 38. *Connyers and Brandling.*

Upon *Elegit* there needs no *Liberate*. *Aliter* upon a Statute, *March.* 117.

The Sheriff to set the moieties distinctly.

In every *Elegit* the Sheriff must Return and set out the Moieties distinctly, unless they be Tenants in Common; and in that case he must Return the special Matter, *1 Brownl.* 38.

Sale, or extent of a Lease, and the diversity

On the 2d *Elegit*, the Sheriff can only deliver a moiety of the moiety left.

On Inquisition of a Lease which is but a Chattel, the Sheriff may sell it as Goods; but if he extends it, there shall be no other benefit than as of a Common Extent, *Id. ib.*

Two persons Recovered severally against one in Debt: He who had the first Judgment sued first an *Elegit*, and had the Moiety of the Land delivered in Execution; after the other sued the *Elegit*, and the Sheriff prayed the Advice of the Court. *Per Cur.* He shall deliver but the Moiety of that Moiety which he had at the time of the

Writ

Writ awarded, Cro. Eliz. 482. *Huitt and Cogan.*

S. H. acknowledged two Judgments in Debt to *A.* upon Bond, and was bound to *F.* in a Bond bearing date before the Judgments. *F.* assigns his Debt to the King. *A.* takes out Execution upon his Judgments, viz. two Elegits; by one he has one Moiety of *H.*'s Lands, by the other the other Moiety: Then Process issued out of the Exchequer, for the Debt assigned to the King. *Per Cur.* It was Resolved,

1. This Subjects Title is prior to the Kings, and the King is bound by the Statute of 33 H. 8.

2. *Pasch. 13 Jac. B.C. Rot. 121. Crook's Case*, Adjudged. The two Extents are well executed; because both Judgments are in one and the same Term, and no priority between them, *Hardr. p. 23. Attorney General versus Andrews.*

Actual possession ought not to be delivered on Elegit, the Sheriff ought only to deliver Seizure to enable the Plaintiff to maintain an Ejectment, and the Tenant may plead on the Ejectment, else the Tenant would be turned out unheard and be remediless; yet if Actual possession be delivered it is remediless, 3 *Keb. 243. Jefferson and Dawson.*

In Elegit the Sheriff ought to deliver the Moiety by Metes and Bounds, *Hutton p. 16.*

If the Land be first Executed upon a Statute, and afterwards an Elegit upon a Judgment obtained before the acknowledging of the Statute come also to the Sheriff, the Moiety of the Land extended shall be delivered to the Plaintiff upon the Judgment, 1 *Brownl. 38. Freeman's Case.*

The Return, how to be made.

Vid. tit. What Writs need not be returned,
4Rep. 65.

Ca. fa.
after an
Elegit.

If a man sue an *Elegit* upon a Recovery, and the Sheriff Return, That he made partition of the Lands of the Defendant by 12 Jurors; but he could not deliver the Moiety to the parties according to the Writ; because all the Land was extended to another upon a Statute. He may after have a *Ca. fa.* for this Return is all one with a *Nihil* Returned, *Mich. 31 & 32 El. Palmer and Knowles.*

If one pray an *Elegit*, and this entred on Record in *Banco*, and takes out the Writ; and before the Return of it the Record is removed into the Kings-Bench, where the Judgment is affirmed within the year, and after it is affirmed to the Court, that the Sheriff had Returned his Writ in *Banco*; yet the Plaintiff may have a *Capias*, for that this Allegation doth not appear to the Court, and now its impossible it can be Returned here, and so its stronger than if a *Nihil* had been Returned, *Trin. 15 Jac. B. R. Andrews and Cope.*

Upon *Elegit* the Sheriff ought to Return the Extent, and also that he hath delivered the Lands.

Elegit need not to be Returned. Therefore if the Sheriff by force of an *Elegit* delivers to the party the Moiety of the Lands of the Defendant, and does not Return the Writ; if now the Plaintiff will bring Action of Debt *de novo*, the Defendant may plead in Bar the Execution aforesaid, tho' the Writ of Execution was not Returned,

Retorned, *Earl of Leicester's Case*, 1 Leon. p. 280.
Penruddock and Newman.

The Sheriff Retorns upon *Elegit*, That the Extent by party had not any Lands, but only within the the Bayliff Liberty of *St. Edmundsbury*, and that J. S. Bayliff of a Liberty there hath the Execution and Retorn of all Writs, who enquired and retorned an *Extent* by Inquisition, and that the Bayliff delivered the Moiety to the party, and the Plaintiff by virtue of that *Extent* entred.

Per Cur. 1. The Bayliff may make such Inquisition by Warrant from the Sheriff.

2. When a Jury by the Inquisition find the seisin and value of the Land, the Jury shall extend all the Land; and the Bayliff in a Franchise, and the Sheriff where there is none, shall deliver the Moieties, and not the Jury, *Gro. Car.* 317. *Sparrow and Matterfob.*

On an *Elegit*, averring no Goods were seised, it hath been held no *Scire facias* lieth; but upon a *Fieri fac.* bare seizure is an Execution, 2 Keb. 789, 821. *Smith and Mildmay.*

It was found by Inquisition on *Elegit*, that the Defendant was seised of the Moiety of a Messuage and Lands for Life, and other Lands in the Right of his Wife; the Sheriff Retorns, *Quod virtute brevis, &c. deliberari feci medietatem omnium præmissorum, videlicet, medietatem medietatis unius messuagii necnon duo pomar' necnon unum clausum.* The *Elegit* was filed; the Retorn is not good, the Sheriff ought to have delivered to him the moiety of the moiety of the Lands joyntly, so that the Tenant by *Elegit* may be Tenant in Common of a fourth part with the Joyntenants: But by this delivery in Severalty he had in effect but the 8th part; for the other Joyntenant may occupy the Land delivered with him

him in Common; if it had been *duorum pommiorum* it had been good. And he cannot have a *New Elegit*. *New Elegit* properly; but the Plaintiff shall make a surmize that the Sheriff *malè suggestit* in the Execution of the *Elegit*, and then he shall have a New one at his peril, *Latch. Rep. 77. Score and Kendale.*

Conisor
keeps the
possession
of the
House.

An *Alias*
extendi
fac', where
it may be,
or not.

Entry of
Retorn on
the Roll.

New Elegit
without
Continu-
ances.

An Extent upon a Statute-Merchant. The Plaintiff put the Conisee in possession of parcel of an House and Lands, and suffered the Conisor to continue in the rest of the House, by reason whereof the Conisor kept the possession of the whole and held the Conisee out. The Conisee, to the intent he might have a full and perfect possession of the Whole, caused the Sheriff that he did not Retorn the Writ of Extent, on which it is entred on the Roll, *Quod Vicecomes nihil inde fecit nec misit breve*; an *Alias breve extendi facias* may well be awarded. And the Sheriff cannot Retorn, that the Land was formerly extended by the Old Sheriff; because by the Entry upon the Roll it appears that no Execution was done; but if the Entry be not, the same is an Execution for the party, tho' it be not Retorned, 2 *Leon. 12. n. 20. Colehill and Hastings.*

It was said in 1 *Keb. 91.* That after one *Elegit* Retorned, they cannot have another *Elegit* without Continuances. But *per Cur.* the Course is not to make Continuances in the Roll, but awards severally. And *per Cur.* if *Nihil* be Retorned he may have a *New Elegit*; but if an Acre be Retorned, he can have no other.

The Form of the Retorn of an *Elegit* with Inquisition, taken, 2 *Sand. 244.*

Sheriff

Sheriff takes Inquisition upon *Elegit*; the Plaintiff may enter immediately before the Return of it, 1 *Rolls Abr.* 738. *Lister and Bromley*.

Presidents.

Return of *Elegit* with Inquisition taken on it, *vid.* 2 *Sand.* 68.

The Sheriff Returns *Nihil* as to Goods and Chattels on the first *Elegit*; yet on the second *Elegit* a Lease for years was taken in Execution, tho' the Suggestion for the second Writ was of Lands, and nothing of Chattels, *Mo.* 341. *Hunger and Fry*.

The Form of the Return of *Elegit*, *Dalt.* 231, 232.

Upon *Elegit* the Sheriff Returned, That he had delivered to the Plaintiff Goods and Chattels of the Defendants *ad valentiam* 20 l. *per rationabile pretium*, and shewed what the Goods were in certain; and also that he had delivered 20 Acres of Land of the Defendants, *quæ est medietas omnium terrarum per rationabile extensum*; but Returned no Inquisition, *scil. per Sacramentum* 12 &c. *Per Cur*. There ought to be Inquisition, and the Sheriff himself cannot extend it, *Dyer* 100.

Plaintiff declares, where the Defendant had seized Goods of *I.S.* by vertue of an *Elegit*, sued by the Plaintiffs and delivered to the Defendant, being Deputy Sheriff, he in consideration, that the Plaintiff at the request of the Defendant, would prosecute another *Elegit*, and deliver to the Defendant, and Authorize, some person to receive the Goods, promiseth to procure the Goods to be found by the Inquisition, and to deliver the Goods to the Person Authorized. *Per Cur.* the Promise is not lawful, the seizing of the Goods, In Consideration he would prosecute a New *Elegit*, a Promise to procure the Goods to be found is not good

Goods, by the first *Elegit* was not good; for want of an Inquisition: And it differs from a *Fieri fac.* so that the Defendant is a Trespassor *ab initio*, and this promise is to make good his *Tort*, and the Sheriff must Return a Jury indifferently, and this promise engageth him to the contrary, and one part of the promise being unlawful makes all Vicious. *Sir Thomas Fone's. Rep. Morris and Chapman, Carter Rep.*

Where
shall be a
new *Elegit*.

A new *Elegit*, Issued upon Suggestion, that the party had other Lands in the same County, for if it appear that one takes part of the Land upon delivery of the Sheriff and accepts it, he cannot after take a new Extent; and if he does 'tis wholly void, for then the Record is ended, and the Attornies of both parties are out of Court; but if it is found that he came into Court, and surmised that the party had other Lands in the same County, and prayed a new *Elegit*, he shall have it; for this is intended the first day of the Extent Returned, and then it is reason he may wave it, and pray a new Extent, for he never accepted of the first. *Mo. 341. Hunger and Fry. Cra Eliz. 310. mesme Case.*

After a full and perfect Execution had by Extent, and Returned of Record, there shall never be any Reextent upon any Eviction; but if the Extent be insufficient in Law, there may go out a new Extent; as *Elegit* Issued out against *G. Esq;* who at the time of suing the Writ was *Baronet*, it was insufficient since the *Stat. 23. H.8. cap. 5. Co. Lit. 290, &c.*

Of *Elegit*, and the Return, *Vid. Fulwood's Case 4. Rep. Vid. W. 2. c. 17. 2 Inst. 39.*

Where Execution shall be awarded upon Elegit, and how the Sheriff shall demean himself upon it, and what Lands shall be delivered, and the Return.

If more than a Moiety be delivered upon the Elegit, 'tis for the whole, *Siderf. p. 91. Berry and Wheeler.*

Of the Sheriffs Extent of a Term, *vid tit. Fi. fac.*

The Sheriff may Extend, or sell a Lease, and this Sale shall bind the King, because but a Chat-
How De-
livered.
 tel, and no Covin in the case, 8. *Rep. Sir George Fleetwoods Case.* Judgment in Debt against a Joynt-tenant for Life, who releaseth to the other and dyes. The Plaintiff sues Elegit. *Per. Cur.* the release being his own act shall not discharge his Moiety of the Execution, for by the Acceptance of the Release he has deprived himself of the jus accrescendi, 7. *Rep. 78. Lord Aburgavennies Case.*

A Rent sock (where there is not any Rediffi-
What shall
be delive-
red.
 fin) cannot be delivered, *ut liberum tenementum*, *Cro. Eliz. p. 656. Walsal and Heatb.* Annuity certain is extendible by Elegit. *Cro. Jac. 78. Torke and Twine.*

Where the Sheriff extends a Manner by the name of Acres, Land, Meadow, Wood; no Advowson passeth, *Owen's Rep. p. 4. Brag and Brook.*

In Elegit the Sheriff ought to deliver the Moiety by *Metes and Bounds.* *Hutton. p. 16.*

Upon recovery in C.B. against G. The Plaintiff prays Elegit to the Sheriff of London, where the Action was brought, and to the Sheriff of Lancaster, (as the course is) by *Sci. fac.* directed to the Chancellor of the County Palatine, and this Elegit appears to be grounded upon a *Testatum*,
first

first made by the Sheriff of *London*, that G. had nothing in *London*, *ubi revera* they never made such Return, and upon this the Sheriff Returned that he took a Lease of Tythes, which the Sheriff delivered to the Plaintiff, as the Goods and Chattels of G. for the Debt, and that G. had not *plura bona*, &c. *Per Cur.* no Return being made by the Sheriff of *London*, and it appearing that no *Testatum* was ever awarded, it is Error, for the Plaintiff in *B. C.* might have taken

Elegit into
London and
Lancaster
or any o-
ther Coun-
ties.

On Sale of
a Term
where the
Term shall
be resto-
red or not.

his *Elegit* immediately into *London* and into *Lancaster*, yet he hath waved this benefit, and grounds his Execution upon a *Testatum*, which is false, and now G. shall be restored to his Term again; for the Sale and delivery of the Lease to the party himself on an *Elegit* is no Sale by force of the Writ, and it is in Law, but a bare delivery in *specie*, and upon reversal shall be restored in *specie*, and doth not alter the property absolutely, but attends the goodness or illness of the Execution. But if the Sale had been to a stranger for 100*l.* tho the value had been 1000*l.* yet upon reversal, he shall not have the Term, but the Money, for it is the folly of the party that he did not pay the Judgment: So on Sale by *Fi. fac.* the Term shall never be restored. *vid. supra Cro. Jac. 246. Tel. p. 179. Goodyear and Ince, Tel. 180. Vid.* where there shall be a Re extent or no.

If no Return be upon *Elegit*, the party after the Year and Day shall have a *Sci. fac.* and after this a new *Elegit*. *Mo. p. 24. n. 83.*

The Sheriffs Office about Execution for the Kings Debt

After the Stat. 33. H. 8 c. 39. was made for levying of the Kings Debt, the usual Process to the Sheriff at this day is,

QUOD diligenter per Sacrament. proborum & legalium hominum de balliva tua inquiras, &c. quæ & cujusmodi bona & catalla & cujusmodi pretii idem debitor habuit in dicta balliva tua, &c. Et ea omnia capias in manus nostras ad valentiam debiti præd. & inde Fi. Fac. debitum præd. &c. Et si forte bona & catalla prædicti debitoris ad solution. debiti prædicti. non sufficerent tunc non omittas propter aliquam Libertatem quin eam ingrediaris & per sacrament. præd. proborum, &c. diligenter inquiras quas terras & quæ tenementa & cujusmodi Annuu valoris idem (debitor) habuit seu seiscitus fuit in dicta balliva tua, &c. Et ea omnia & singula in quorum manibus jam existunt extend. fac. & in manus nostras capias, &c. Et capias præd. (debitorem) ita quod habeas corpus præd. (debitoris) ad satisfac. nobis de debito præd.

Whereby it appears, that if the Goods and Chattels of the Kings Debtor be sufficient, and so can be made to appear to the Sheriff, whereupon he may levy the Kings Debt, then ought not the Sheriff to extend the Lands of the Debtor or his Heir, or of any Purchaser, or Ter-tenant.

If one extends a Statute Staple at the Suit of The King A. the Sheriff extends the Lands, and takes the to be pre- Goods, and seisceth them into the hands of the ferred: King, but does not make Livery, and and after a Writ of Prerogative of the King issues out.

The Office and Duty of Sheriffs, &c.

of the *Exchequer*, and commands the Sheriff to levy the Kings Debt of B. (*viz.*) 100 l. of the Goods of the Debtor; and if he had not sufficient, then to Extend his Lands; and this is delivered to the Sheriff after the first Writ of *Extens*, but that was not Retorned. The Sheriff in this Case ought to execute the *Extens* for the King's Debt; because the property of the Goods and Lands were not in A. before they were delivered to him by a Writ of *Liberate*, and the Goods being seised into the hands of the King for the use of the parry, were priviledged from all other Executions, but that of the King only, 2 *Roll. Ab.* 158. *Dyer* 67. *Stringfellow's Case. Hob.* 339.

Property
of the
Goods not
in the
Plaintiff
before the
Liberate.

Where the Officer without any Warrant or Authority shall levy any Duty for the King, and shall after account for the same in the *Exchequer*, or otherwise pay the same to the King's use, there the Officer seemeth chargable but as a Trespassor; but if he shall convert the same to his own proper use, it is Felony.

Execution
on Stat.
Merchant.

If a man be bound in a Statute-Merchant (and does not pay the Debt at the day) Execution shall be done thereof in this manner; the Conisee must come to the Major, or other Officer, before whom the Statute was acknowledged, and pray him to Certifie the same into the *Chancery*, under his Seal, &c. and if he will not Certifie it, then a Writ of *Certiorari* must be sued forth of *Chancery*, directed to the said Officer, to Certifie the acknowledgment of the said Statute into the *Petty-Bag* Office in *Chancery*, and upon the Certificate a Writ of *Execution*; *scilicet*, First, a *Capias* shall go out to the Sheriff against the Body of the Conisor (*si Laicus sit*;) but the Debtor, after he is taken, hath liberty given him (within a Quarter of a year) to sell his

his Lands and Goods to discharge his Debts: And if he do not agree for his said Debts within the next Quarter; or if he cannot be found, then all his Lands and Goods upon *Extends facias* shall be Appraised by a Jury, and shall be delivered to his Creditors by a reasonable time, to hold till the Debt be fully paid; and yet the Body of the Debtor, if he be taken, shall remain in Prison until the Debt and Damages be paid. And this Writ may be Returnable into the C. B. or B.R.

Tho' it be within a Franchise, the Sheriff is to execute it himself.

If the Sheriff Return, That the Debtor is a Clerk, then an Extent shall go out against his Lands and Goods only.

If the Debtor find Sureties, they shall be Ordered in all things as the Principal; *scilicet*, As to the Arrest of their Bodies, and delivery of the Lands and Goods.

The Statute ought to be shewed to the Court, where the *Certiorari* is Returned.

The Creditor out of the Profits of the Lands, is to find the Debtor Bread and Water in Prison.

Of Statute-Staple.

A Statute-Staple is of two sorts:

1. *Per Stat. 26 Ed. 3. cap. 9. & sic proprie dicitur*, and is acknowledged before the Mayor of the Staple.
2. *Per Stat. 23 H. 6. c. 6.* before one of the Chief Justices, or before the Mayor and Recorder of London.

▲

Stat. Staple.

A *Statute-Staple* must be Certified into *Chancery* as a *Statute-Merchant*, and on that Certificate Execution shall go presently forth against the Body (*si Laicus sit*,) and Lands and Goods of the Conisor, Returnable into *Chancery*, in the *Petty-Bag Office* there, and not into B. C. or B. R. as *Statute-Merchant*.

The Sheriff on this shall take the Body of the Conisor, and *per Sacramentum proborum*, &c. presently extend, and prize and seise into the King's hands his Lands, Goods and Chattels, and shall Certifie the Appraisment into *Chancery*.

Upon which the Conisee shall have a *Liberate* to the Sheriff, to deliver these Lands and Goods to the value of his Debt; and shall not be delivered to him by the Sheriff before the *Liberate*.

Of Returns on Statute Merchant, Staple and Recognizance; and the Sheriffs demeanor in the Execution.

Before I speak of the Returns, it will be needful to consider the Writs themselves, and the different Forms of them: For they are the Sheriff's Directions.

Statute-Merchant.

The Writ of Execution upon a *Statute Merchant*, is for Lands and Goods thus:

QUOD Vic' omnia bona & catalla terras & tenementa quæ fuerunt prædicti (le Conisor) sine dilatione Liberari faceret per rationabile pretium & extentum tenend' ut liberum tenementum, &c.

And he is not commanded to do it *per Sacramentum proborum*, &c.

But

But the Writ of *Execution* upon a Statute-Staple, and upon a Recognizance in the nature of it (on 23 H.8.) is,

QUOD VIC' omnia terras & catalla per Sacramentum proborum & legalium hominum de balliva sua per quos, &c. juxta verum valorem diligenter extendi & appretiari faceret & in manum nostram seisiri faceret ut ea prefato (le Conisee) quousque sibi de summa predicta satisfactus fueris, liberari faciamus, &c. Et qualiter, &c.

So that as ye may observe by the Forms, by force of the Writ on the Statute Merchant, the Sheriff may deliver the Lands and Goods presently upon the Extent to the party. But by the Writ on Statute Staple, or Recognizance in the nature of it, he is to extend the Lands and Goods, and to seise them into the hands of the King; but not to deliver them to the party without a *Liberate*.

The Proceedings in a Statute-Merchant, is a Difference *Capias*, and if the Sheriff thereupon return a *Cepi corpus*, then he shall remain in Prison a quarter of a year, within which time he may sell his Goods and Lands to pay his Debts, and this by the express words of the Statute of 15 H. 7.c.16. but if the Sheriff return *Non est inventus*, Execution shall be granted of his Lands and Goods.

But in a Statute-Staple and Recognizance, the first Process is to take his Body, Lands and Goods all in one Writ; for this is by the express words of the Statute, and a more speedy Remedy than the Statute-Merchant.

The Office and Duty of Sheriffs, &c.

Now on a Statute-Staple and Recognizance, the Writ of *Execution* upon Return of the Conifor dead, is to extend the Lands *nec non catalla*, which were of the Conifor at the time of his death: And this is the constant course, as appears by Records of *Extents* which are in the Rolls.

On Extent of a Statute-Merchant the Sheriff Returns, That the Body cannot be found, and that he had extended the Lands and delivered them to the Plaintiff, Reg. 146.

The Sheriff may return *Non est inventus, nec habet bona nec terras*; the Sheriff returned the Conifor *mortuus*, Dyer 299.

Upon Extent of a Statute-Merchant, or Staple, the Sheriff may return, That the Debtor is Clerk. If he return *Tardè*, or *Mandav' ballivo Libertatis*, he shall be punished.

Lands in Ancient Demesne shall be taken in Execution on a Statute; but not Copyhold-Lands, 4 Rep. 67. 5 Rep. 105.

Where the Debt of the Conifor appeareth in the Return, there of necessity his Seisin must be found to be of an Estate in Fee-simple only, Dyer 299.

Execution upon Recognizance, per Stat. 32 H. 8. c. 6. hath the effect of a Statute-Staple.

Return' Liberate post Extent' fact' super Oblig'
Statut' Stapulæ.

Virtute, &c. *Liberavi infranominat' B.S. maneria terras & tenementa infra script' habena' sibi & assignat' suis ut liberum tenementum suum quousque sibi de debito infra scripto una cum damnis misis & expensis suis plenarie fuerit satisfact' prout, &c.*

Return'

Retorn' de Extent' super Recogn' vel Stat'.

Virtute istius brevis mihi direct' cepi corpus infranominat' W. W. cujus quidem corpus ad diem & locum infra content' paratum habeo prout interius mihi præcipitur.

Resid' Executionis istius brevis patet in quadam Inquisitione huic brevi annex'.

A.B.Armig. Vic.

War. **I**nquisitio indentat' capt' apud C. in Com. præd. 12 die Jan. Anno &c. coram A. B. Armig. Vic. Com. prædict'. Virtute brevis Dom. Regis mihi direct'. & huic Inquisitioni annex' per Sacramentum T. B. &c. (Et sic XII.) qui dicunt super Sacramentum suum quod W. W. in brevi prædict'. nominat. die recogn. debui' in eodem brevi spec. fuit seiscitus in dominico suo ut de feodo de & in manerio de A. in Com. præd. clar. annui valoris in omnibus exitibus ultra reprisas 100 l. Et ulterius Juratores prædict'. super Sacramentum suum prædict'. dicunt quod præd. W. W. die recognitionis debui' præd. seu unquam postea nulla habuit bona sua catalla, neque al. sive plura terr. sive tenementa in Com. præd. ad eorum notitiam quod extend. apprehendi aut in manus dicti dom. Regis capi aut seisciri possint. Quæ quidem manerium terr. & tenementa prædict'. cum pertinentiis Ego præfat. Vic. die captionis hujus Inquisitionis cepi in manus dicti dom. Regis per Extent. præd. In cujus rei testimonium tam ego præfat. Vic. quam Jurat. præd. huic Inquisition. sigilla nostra alternatim apposuvimus die anno & loco supradict', &c.

A.B.Armig. Vic.

Extent

Retorn.

Extent on a Statute-Merchant issued out against R. the Conisor; the Sheriff Retorned, That the Conisor was possessor of divers Goods, and seised of Lands, which he delivered to the Conisee, and that the Conisee accepted of the Land; and because the Sheriff did not Retorn, That he had not any other Lands, Goods or Chattels. It was Adjudged Insufficient, and a new Writ awarded; tho' some held it was well enough in the Case of a Conisor, but not in the Case of a Purchaser, 1 Brownl. 37. Fletcher and Robinson.

If the
Conisor
be dead,
how Exe-
cution to
be.

Note, If the Conisor be Retorned dead, Execution shall be granted against his Executor, without *Scire fac'* to have Execution of his Goods; so against the Heir and Tertenants of his Lands without a *Scire fac'*, *Quere.* 15 H.7.16.b. 2 R. 3 8.b.

If the Sheriff do not Retorn the *Capias*, or retorn *Tardè*, or that he directed it to a Bayliff of a Franchise, he shall be punished, and yield Damages to the party grieved, according to the Statute of *de Mercatoribus*, W.1.c.39.

Two Inquisitions taken at several days by several Juries upon one Statute-Merchant, were Adjudged naught: One was taken of the Lands, and the other for the Lands and Goods, 1 Brownl. 38.

If another had these Lands in Execution by *Elegit*, or is in by discent; in such Cases the Sheriff shall Retorn the special Matter; i.e. in the first Case, that he hath extended the Land of the Defendant: But he cannot deliver the same to the Plaintiff; for that another had the same in Extent before.

The

The Sheriff having an Extent upon a Statute, may gather the Goods all into one place to be viewed and appraised by the Jurors, and he is not a Trespassor, *Mo. 563. Attorney General vers. Crocker.*

As to what Lands, &c. shall be extended upon Statutes, &c. it does not properly belong to this Treatise, which hath a respect only to the Office of Sheriff.

Note, If Lands delivered in Execution (on a *Scire fac'*, Statute-Merchant, Staple or Recognizance, or *and New Writ of Execution, where.* upon recovery of Debt and Damages) are lawfully recovered or evicted out of the possession of the Conisee, before his Debt and Damages be satisfied, he shall have *Scire fac'*, &c. and upon this a new Writ of Execution, or *Re-Extent*, to levy the residue *per Stat. 32 H. 8. c. 1. 1 Inst. 289, 290, 5 Rep. 87.*

Note also, It is a Question in *2 Brownl. 270.* By whom King James Incorporated the Mayor, Bayliffs and Burgessees of *Berwick*, and granted to them the Execution and Retorn of all Writs, Whether an *Extendi facias* shall be Executed by them, or by the Sheriff of *Northumberland*?

Some said *Berwick* is English, which appears by the Act of Parliament which confirms the Letters Patents, and also they send Burgessees to Parliament.

Others said, It is a part of *Scotland*, and a Sheriffwick. An Obligation there shall not be Tried in *England*; and it is not in the County of *Northumberland*, nor part of it.

By

The Office and Duty of Sheriffs, &c.

By *Siderfin* p. 382. our Laws are not current there: But yet in *Jackson and Crisp's Case*, Local breach of Covenant at *Berwick*, Tried at *Fel-ford* in *Cumberland*, 2 *Brownl.* 270. 2 *H.* 7. 31. 26 *H.* 23.

Returns on Scire facias.

Scire facias is a Writ Judicial, directed to the Sheriff, &c. and is usually to warn a man, to come and shew Cause to the Court, &c. why Execution of a Judgment shall not be done. But this Writ shall not be granted before the Year and day past, after Judgment given.

Retorn not
agreeing
with the
Writ.

Conisor in a Recognizance dies, *Scire fac'* goes against his Executors, & *Heredes terrarum*, &c. Sheriff Returns, That he had no Executor; & *Scire feci* W. H. filio & *heredi predicti*. M. (le Conisor.) This Retorn agrees not with the Writ; yet it may be good, 3 *Rep.* 15. *Sir William Herbert's Case*.

Scire fac' on a Recognizance in Chancery against C. who was Retorned dead, then a second *Scire fac'* issued against the Heir of C. and against the Tenants of the Lands of C. which he had *tempore Recognitionis vel postea*. The Sheriff Retorned C. Tertenant, and omitted to Retorn any thing against the Heir. This a Non-retorn of the Sheriff, and not a Mil-retorn, and is not aided by any of the Statutes of 32 *H.* 8. or 18 *Eliz.* or 21 *Jac.* of *Feofail*.

The Heir
must be
summoned
as well as
Tertenant,
on a Re-
cognizance

Its Error: The Tertenant without the Heir ought not to be charged; therefore the Heir ought to be summoned, for the Heir may have a Release to plead, or other Matter to bar the Execution. Also if the Heir be within Age, the Parol shall demur, and the Tertenant shall have advantage thereof: And a new *Scire fac'* issued

issued *ad Informand' Curiam*; and the Retorn was, That he had not any Lands in his Bailiwick that descended to his Heir, nor any Heir within his Bailiwick, and good enough; tho' it had been better, if he had Retorned who was Heir, and that he was warned, or that there was not any Heir in the said County, *Cro. Car. 295. Eyres and Taunton.*

The Writ Commands the Sheriff to give Notice to the Tenants of the Land in Fee-simple, and the Sheriff Retorns not, That those which he had Retorned were Tenants of the Land in Fee-simple, and so the words of the Writ are not answered, *1 Brownlow Rep. 145, 146.*

The Sheriff may Retorn 24 Tertenants of the whole, and every Tenant may plead in discharge of himself; or he may Retorn, That each is Tertenant of so many Acres, *2 Keb. 601. Henshaw's Case.*

Scire fac' to have Execution on a Recognizance. The Sheriff Retorns the Conisor dead, other *Scire fac'* Issues against the Tertenants of the Conisor, on which the Sheriff retorns a *Scire feci* to W. and R. Tenants; and further, that there was no Heir nor any other Tenants, *quibus Scire fac' poterit, & la forma, 1 Keb. 621. 2 Sanders 6. Jefferson and Moreton.*

Scire fac' against the Heir and Tertenants, the Sheriff Retorns no Heir, and the Tertenants appear, *& la form, 2 Sanders. Jefferson's Case.*

Scire fac' to Tertenants, the Sheriff retorns they are Summoned, *la forme 2 Sanders 6, 8, 232.*

Scire fac' ad audiend' errores must be delivered to the Sheriff, *1 Rols Rep. 329. Sr. Thomas Middleton's Case.*

Scire fac' ad audiend' errores.

If

Special
Scire fac.
Ret.

If a Special Scire fac^s do Issue forth, a Nihil cannot be returned upon it, for Nihil is a general Return, and the Writ is Special, *Pract. Reg. rit. Return.*

Ret. of
the second
Scire fac^s
when to
bear date.

The Return of the second 'Scire fac^s' ought to bear date on the Return of the first Scire fac^s.

Return de Scire fac^s.

Virtute istius brevis nihil direct^s per A. B. & C. D. probos & Legales homines de Balliva mea Scire fec^s infra nominat^s J. S. qd. sit Coram Justiciariis Domini Regis (if it be in the Common-Pleas) vel Coram Domino Rege (if in the King-Bench) vel Coram Baronibus Domini Regis (if in the Exchequer) ad diem & locum infra script. ad ostend. & proponend. si quid pro se habeat vel dicere sciat quare, &c. according the Matter contained in the Writ) prout nihil interius precipitur.

Infra nominat. A. B. nihil habet in Balliva mea per quod ei Scire facere possum, neque est inventus in eadem (if the Return be in Chancery) — qd^s sit Coram Domino Rege in Cancellaria.

Two Nibils Returned countervail a Scire fac^s.

To Scire fac. sur Recognisans, Sheriff Returns that the Defendant is dead, 2 Sanders.

Scire fac. Vid. Tertenants, The Sheriff Returns they are Summoned, 2 Sanders 8.

The Sheriff's Demands and Office as to Outlawries and Capias Utlagatum, and Return.

He which is sued in a personal Action, if he do not appear on the Mean Process, then the *Exigent* is directed to the Sheriff to call and pro-
claim him in five County Court Days one af-
ter another, to answer to the Law; and when, upon the *Exigent* the Sheriff Returneth *quod non comparuit*; upon this Return, the Plaintiff shall have a *Cap. utlagatum* against the Defendant, but if the Defendant appear upon the *Exigent*, he shall have a *Supersedas*.
The manner of suing to the Outlawry.

Where upon the *Exigent* the Sheriff returneth *Reddidit se*, he must have the Body in Court at the day of the Return of the Writ, except the Party be Sick.

The Sheriff may Return the Coroners were absent.

As for the Forms of these Returns, *vid. Dalt. cap. 59.*

A *Capias utlagatum* is a *non omittas* in it self. And therefore the Bayliff of a Liberty cannot Execute a *Cap. Utlagat.* and if the Party be in the hands of the Bayliff the Sheriff may take him.
The Bayliff of a Franchise cannot Execute a Cap. Utlagat.

If a *Capias Utlagatum* Issues to the Sheriff to take the Party, and to enquire what Lands and Tenements he had, the Sheriff finds by Inquisition, that is seised of many Lands, and continues Possession in them, he cannot put the Party out of Possession by force of that, *Winch*
Sheriff not to put the party out of possession.
p. 78.

An

The Office and Duty of Sheriffs, &c.

Retorn as
to the Hu-
stings in
London.

An Outlawry Retorned in London in these words. *Ad Husting. tentum in Guildhal Civitatis London tali die A. B. exactus fuit & non comparuit*: This is no good Retorn, because there are two Hustings in London, one is *de communibus placitis*, and the other is *de placitis terre*; in such case the Retorn must be *apud Husting de communibus placitis*.

Ret. where
the City is
City and
Country.

The City of Norwich is within the County of Norfolk. Also it is a County in it self, which may hold Plea. And therefore if a Retorn be made in these words, *Ad Com^o tentum apud Norwicum in Com. Norfolk*. This is not good, for that it may have two Intendments (*scilicet*) that the County which was held there was for the City, or for the County of Norfolk: But if the Retorn be in these words, *Ad Comitatum Norfolk^o tentum apud Norwicum in Comit. Norfolk.* it is good, for now it cannot be intended, but only that their County was held for the County of Norfolk, 11 H. 7. 10. b.

Protection
Retorned.

In a *Cap. Utlagar*. the Sheriff retorned, that the Party who was Arrested had a Protection from a Peer of Parliament it is Ill; and day was given to the Sheriff to amend his Retorn, *Winch p. 24*.

Proclama-
tion Re-
torned.

Proclamation was directed to the Sheriff of Cheshire against J. H. and the Writ was Retorned, *Tali die ad Comit. meum sent. en le Shireball, &c. Proclamationem feci ac eod. die ad General Session. &c. Proclamationem feci*, and this Matter was pleaded in avoidance of the Outlawry to Reverse it, because the Proclamations were made one day, and the Writ was *tribus specialibus diebus, &c.*

Per Curiam, It is an ill Retorn, and the Sheriff was amerced for it, *Goldsborough 111*.

By the Custom of London the Writ was directed to the Sheriff of London, and not to the Coroner (who is Mayor.)

The Return of the Outlawry out of London in B. R. is generally made without saying *per iudicium Coronat.* 2. Rolls Ab. 806.

Error to Reverse an Outlawry in the County of Lancaster, for that the Sheriff returned *qd. ad Com. Lancastriae tent.* *ibid.* where it should have been *ad Com. Lancastriae tent. apud Lancaster*, or at some other place certain, and it was reversed, 9 Rep. 94. Dyer 105.

The Exigent was Returned, *ad Com. tent. apud Retorn castrum de Exon primo exactus fuit, &c.* and because *Exigent* it was not set down in what County, it was held to be Erroneous. One was returned Outlawed, and for that it did not appear, that it was *per iudicium Coronatorum*, it was reversed, and that without any Writ of Error.

Vltute istius brevis mibi direct. cepi corpus A. B. *Cap. 1.*
infra nominat. cuius corpus Coram Justiciariis *This the*
infra script. ad diem & Locum infra content. parat. *Form of*
habeo prout interius mibi precipitur, residuum vero Ex- *Returns;*
ecutionis istius brevis patet in quadam inquisitione
huic brevi annex.

So on non est inventus, residuum vero, &c.

Inquisitio Indentat. capt. apud, &c. Qui dicunt
super Sacramentum suum qd. J. S. in dicto brev.
nominat. nulla Bona neque Catalla Terr. sive Tenemen-
ta habuit aut tenuit in Com. prae. die Jovis prox.
post festum Sanct. B. Martyr. Anno Regni Domini
Regis nunc tertio in dicto brevi specificat. nec unquam
postea, quae in manus dicti Domini Regis capi ac
seisiri possunt ad noticiam Furatorum praedict. In cu-
jus rei Testimonium tam sigillum Com. prae. quam
Furatorum praed. huic Inquisitioni Indentat. sunt op-
pensa dat. die anno & loco supradict.

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Other Retorns in *Capias Utlagat.* *vid.* Dalton,

215.

Retorna de Exigent, vid. Dalt. 236.

The Judgment is, *Ideo Utlagat.* Coronator's
1 *Inst.* 288.

The profits of Lands of the Person Outlawed
in personal Actions, the Sheriff may seize with-
out any Office, and also the Goods.

C H A P. XX.

*Where and in what Cases Action lies against a Sher-
riff for a Rescous, and what Action. Diversity
between Mean Process and Execution: Where the
Sheriff makes himself chargeable by his Return.
Where and what Remedy against the Rescouf-
er by Action or Indictment. Of Return of Res-
cous. What is good or not. Of Laying the
Action, and how to Declare. Of Rescous and
Pleadings in it. The Venue in this Action.*

Of Rescous.

*Where and in what Cases Action lies against the
Sheriff for a Rescous or not.*

IF in the Arresting the party is rescued, be it
on Execution or Mean Process, no Action
for this lies against the Sheriff: And if the Pri-
soner be Arrested on Mean Process, and as he
is bringing to the Gaol he is rescued, no Action
lies against the Sheriff, for the Sheriff cannot be
supposed to have the *Posse Comitatus* upon every
Mean Process, *aliter* if it be upon Execution;
there

there *Caveat Vicecomes*. But if he be Arrested upon Mean Process and brought to the Gaol, then its no good Return for him to say, the Gaol was broken and so he was taken from him. And therefore, Action on the Case was brought against the Sheriff of *London and Middlesex* on Escape, they plead they had taken the party on a *Latitat*, and that in bringing him from *Islington* to the Gaol, Rescous was made of him from them, and so Return the Rescous, 16 *Ed.4.3. Bastard Faulconbridges Case*, 2 *Bulst.* 198. *May and Proby*, *Cro. Jac.* 419. *Mo.* 852. *Cro. El.* 868. *Noy* 40. 1 *Roll. Rep.* 388. *Roll. Ab.* 99. *Mesmes Case. Popbam* 192.

Diversity
between
Mean Pro-
cess and
Execution
as to Res-
cous.

Per Cur. The Plea and Return is good, notwithstanding *Waldoe and Lamberts Case*, 44 *El.B. R.* and that upon the former differences; and the difference between Mean Process and Execution was enforced in this Case. If the Sheriff take one in Execution for Debt, and after he suffers him to Escape; the debt is gone and the Process served, therefore in such case, if he should not have his remedy by way of Action against the Sheriff, he should be without remedy: But not so in Mean Process, for there the Party may be taken again.

Action of Debt lies against the Sheriff upon a *Cap. returned qd cepit Corpus* and he was rescued, 2 *Rolls Rep.* 57, 58.

No Rescous can be on a *Scire fac'* for Goods, but in such case the Party shall have Action on the Case: And a Rescous lies only on a *Capias* which lies against the person, and *Cro. Car.* 515. *Sly and Finch's Case*, which is full as to the Point, and was as follows, *Lit. Rep.* 297. *the Sheriff of Surry and Alderton's Case*, *Hutly* 145. *Mesmes Case*.

Scire fac' was brought against *Finch* Sheriff of *Glouc'*, for that the Plaintiff having brought a *Fieri fac'* directed to *Finch*, he returned that he had taken Goods into his Hands to the value of 72 l. and had sold as much of them as amounted to 11 l. and the residue remained *pro defectu emptorum* till such a day, at which time he putting them to sale, they were rescued from him, upon which return the *Scire fac'* was brought to shew cause, why the remaining Debt should not be levied on his Goods: To this the Defendant Demurs. All agreed that the Return is not good. But the Question was, Whether he hath charged himself by this Writ, *Cro. Car.* 515. *Sly and Finch*, *Sanders* 340, 343. *Mildum and Smith*, 2 *Keb.* 789, 821. *Mesme Case*.

Where the
Sheriff
makeshim
self charge-
able by his
Return.

*Vend' ex-
ponas.*

Plead.

And *per Cur'* he is chargeable by this Return. If he had returned only *qd' remanent pro defectu emptorum*, therein he had done his Office, and in such case on the Election of a new Sheriff, a *Distingas Vicecomis'* shall Issue to sell the Goods, and to deliver the Money to the new Sheriff. But when he saith further, that they were rescued out of his Hands, therein he hath misdemeaned himself. And by *Dodderige*, the Sheriff hath charged himself by this Return, as well in regard of his Misdemeanor; as also, that he hath his remedy over against the *Rescouffers*: Nor can the Court award a Writ of *Venditioni exponas*, because its against his own Return. But if it be objected, that perhaps he had seised the Goods again, so as he may sell them on a *Venditioni exponas*, if so, then he ought to have pleaded it to the *Scire fac'* and it had been good.

Action on the Case.

Lynn and Cunninghams Case. It was a great Question, if one shall have Action against the parties that rescued. Three Judges were of Opinion he should, tho' it was well objected, if he shall have Action against the party, he shall also have Action against the Sheriff, and so betwixt satisfied, and the Sheriff shall have Action against the party, and so he shall be twice charged.

By *Richardson*, a Man in some case shall have Election of Action, and both are but to recover Damages; a man had an Execution against one, another saw the man and conveyed him out of sight; Action on the Case lies against him, and perhaps the Sheriff is dead, and he shall have no remedy.

Harvy ad idem: The Law gives a man Remedy against the party that doth the wrong. If an Action on the Case will lie for hindring a Sheriff in Executing his Office, as it was adjudged in *Semain and Greshams Case* 5 Rep. *a fortiori* when it is actually done, and he is rescued out of Custody.

Cro. ad idem that the Action will lie; there is a mischief on both sides; the Defendant may be twice charged, and the Plaintiff may lose his Debt; and if the Sheriff brings the Action, he may plead the Recovery by the Plaintiff. When the Sheriff made his Return of the rescous, there is no remedy against him; and if the party taken, be rescued before he be brought to the Gaol, there is no remedy against the Executors of the Sheriff. If Debt be brought against the Sheriff, and in that a recovery, the Plaintiff shall never take the Defendant again; and so if he bring Action against the party and

T 3

recover.

Action

The Office and Duty of Sheriff, &c.

recovers, the Sheriff may plead that; and *Fitz. N. B.* 12 is doubtful.

Hutton contra, That the Action doth not lie. The difference is good where a man is arrested upon mean Process and rescued, and after becomes *non solvent*, so that they who rescued him are the cause of the loss of my Debt, it is a wrong upon which he may be Indicted, yet the party shall not have remedy against him, because he may proceed. *Telverton* of the same Opinion, and agreed the difference.

By *Hutton*, upon mean Process the Sheriff never had remedy for the Rescous, but he shall return the Rescous; but upon Execution he shall not return the Rescous, but have an Action, and the party is not prejudiced, for he shall have an Action against the Sheriff, tho in Judgment of Law the party is liable.

Remedy against the Rescouer by Action and Indictment.

The Rescouer shall be doubly punished, by the King, and by the party; upon the Return of the Sheriff, he shall be fined to the King, and Attachment shall issue out against him, and the party shall have a Writ of Rescous against him, and so shall the Sheriff too.

Action on the Case lies against the party that rescoued, by the party who had the Loss, and he shall not be forced to Sue the Sheriff, for perhaps the Sheriff is dead, and then no Action lies against his Executors (*actio personalis moritur, &c.*) and if the Plaintiff recover the parties may plead it if they be sued by the Sheriff, so as there is not any danger of being doubly charged; so is *Hoppings Case* 2 *Keb.* 340. Action on the Case lies against the Rescuer as well as the Sheriff.

But

But as to the Case of *Myn and Caughton*, it is well reported and agreed by the Judges in *Hetly. p. 94.* by the name of *Lyn and Cunningham*, which was full to the Point, and the Reasons in respect to this and other cases of like nature, are weighty; I have set down as it is in the Book, with the Reasons of the Judges that differed in Opinion. *Cro. Car. 109. Mynn and Coughton.*

2 *Keb. 340. Hoppings Case.*

The Defendant rescued *B. S.* out of the Baylisff hands when the said *B. S.* was arrested by *Alias capias* out of the Kings-Bench, which Writ is only in nature of a Plea of Trespass; the party who rescued him shall answer in this Action, Damages for the Debt, which was 300*l.* because by this means the Defendant lost his Debt, but if the Sheriff or Bayliff in this case had only suffered a negligent escape, they should be charged only with the Damages in the same Plea as the Writ supposeth, and nothing for the Debt. *Lanes Rep. p. 70. Kent and Kelloway.*

What Damages the Rescouser shall answer.

Remedy against the Rescouser by Indictment, and for what reason quashed or reversed.

Error was brought to reverse an Indictment of Rescous and Ryot, and the Errors Assigned were.

1. There was a Warrant to three *conjunctim & divisim* to arrest *H.* and two of them arrest him, it ought to have been by one or all three, because it is a Ministerial Act, 14. *H. 4. 34.*

2. *Juratores pro domino Rege presentant*, and do not say 12 Jurors present and peradventure, but eleven did present. *Tr. 2 Car. 1. Harrison and Erington.*

The Names of the Jurors ought to have been certified, for peradventure they were not *probi & legales homines*, but Villains and Outlaws, 15 *H. 4. 41.*

Note, an Indictment before Coroners, which found *B. felo de se*, was quashed, because it did not appear it was *per sacramentum proborum & legalium hominum*.

Sheriff makes the Warrant.

4. It is found that the Sheriff by vertue of a Writ directed to him came, &c. and upon this Rescous was made by *H.* &c. and it appears not what manner of Writ it was (*viz. Eleg.*) *Capias*, &c. and if there were no Writ there can be no Rescous; and albeit he had no Writ, yet if Execution were done by vertue of another Writ, the party may disobey it (if he be not a Bayliff known) as if on *Hab. fac. seisinam* the Sheriff makes a Warrant as on a *Capias*. *Tr. 2. Car. 1. Harison and Exington.*

Indictment not to be uncertain.

An Indictment for a Rescous returned against one in *B. R.* ought not to be quashed, altho it be erroneous, except the person Indicted for it do personally appear in Court. *Pract. Reg. Tit. Rescous.*

Indictment of rescous ought to express, the place where and the time when the Rescous, or else it is ill for the uncertainty, *Pract. Reg. Tit. Rescous.*

Retorn of Rescous.

By *Stat. W. 2. c. 39.* a Retorn of Rescous is forbidden, for *redundat in dedecus domini Regis*. The Sheriff may take the *posse comitatus post vel ante Queremoniam*, as well before as after complaint made, and the Delinquents must be punished *coram Rege* in the Kings-Bench, *Co. 2 Inst. 45.*

Upon a voluntary return (if ill) the Sheriff is not fineable, but Action lies against him.

Note, the Court never fines a Sheriff for the ill retorn of a Rescous, because it is voluntary, but they allow exceptions to quash it, because the party cannot Traverse it: But where he is compellable to make a Retorn, he is fineable, but the party shall have his Action on the Case.

Yer

Yet in *Chamber's Case*, 2 *Keb.* 358. the Sheriff is Finable for retorning a Rescous on *Fi. fac'*; but the Return is well enough as to the party, 1 *Keb.* 878. *Burrough's Case*, 1 *Roll. Rep.* 389. *Proby and Lumley*.

Now as to the Ill Returns of *Rescous*, and the Exception to quash it, I shall briefly cite the Cases Adjudged in our Books, for the more perfect Direction of such Returns hereafter to be made.

The Return of a Rescous, without mentioning the place where it was made, is void. The Sheriff returns Rescous upon him at *Dale* in the County of *Bucks*, which was the County into which the Process was awarded. Exception was taken, because he saith not (*infra balliviam meam*.) But *non allocatur*; for if it be within the County, it cannot otherwise be taken, but to be within his Bailiwick, *Mo.* 422.

The Return must mention the place where it was made.

Upon a *Latitat* awarded, the Sheriff returns a Rescous *tali die*; but there is not any place mentioned where the Arrest was made. Its a void Return. For *non constat*, whether the Arrest and Rescous were within the County and Jurisdiction of the Sheriff, *Yelv.* p. 51. *Woolfrost's Case*.

The Sheriff returned a Rescous against the Father and Son; against the Father for rescuing his Son, and against the Son for rescuing himself.

As to the Father, the Return was sufficient as to time and place: But that against the Son wanted such Certainty.

By

The Office and Duty of Sheriffs, &c.

By *Dodderidge*, The Return is good: It shall be intended at the same time that the Father rescued the Son, that the Son rescued himself, and the word (*Et*) is a Conjunction Copulative; and compleats both together.

Haughton contra. A Prisoner may be rescued by others, and he not know of it; and the Rescous may be at several times, 2 *Bulstrode* 137.

The Sheriff in his return of Rescous said, That he was in *Custodia ballivi Itinerantis*, and that a Rescous was made to his Bayliff Itinerant. Its not good. *Aliter*, if it had been Bayliff of a Liberty, *March. Rep.* p. 92.

Rescous quasht, because it is *quod arrestavit*—without saying *in custodia sua habuit*—, 1 *Siderfin* 332.

To say, he
rescued
him out
of the
Custody
of the
Bayliff, is
not good.

The Sheriff ought not to say, He rescoued him out of the Custody of his Bayliff, but out of the Custody of the Sheriff: But it is good, if it were by the Bayliff of a Liberty.

Return of a Rescous was not quasht for saying, *in custodia* for *à custodia*; but because he saith *cepit & arrestavit*, and not *in custodia habuit*, it was quasht; for an Arrest may be only by word, 2 *Keb.* 177. *The King against Claypoole*, and p. 227. *The King against Sympson*.

Exception was to the return of a Rescous, because it was *à custodia ballivi mei. Sed non allocatur*; for there is *veritas legis & veritas facti*, and if either be alledged its sufficient; therefore its as good as if it had been *à custodia mea*. But *Keeling* held it ill; because a Return must answer the Law, and the difference has alwas been between a Sheriffs Bayliff, and a Bayliff of a Franchise.

Franchise. And according to the Opinion of Keeling is Dyer, 7 El. 241. Dyer 241. 39 H. 6. 42. 2 Roll. Rep. 263, 354.

If the Sheriff return in Banco a Rescous made to his Bayliff Errant by these words, *viz. Virtute istius brevis, &c. mandavi ballivo meo Itineranti, &c. qui mihi sic respondit, quod arrestavit, &c.* shewing the year, day and place; and that a Rescous was made, &c. This Return is not good, because this Arrest is the proper Arrest of the Sheriff, and no credit is to be given to the Bayliff Errant; Mich. 8 Jac. in Scaccario, Kent and Helsway's Case.

But per Cur. such a Return in Banco Regis is good enough, because the Presidents of the the Court are accordingly; and such Return by a Bayliff of a Franchise in B. R. is good.

Tho' its said 2 Roll. Rep. 78. the Sheriff ought to return Rescous made to him, and not to his Bayliff, yet in truth the Force is made to his Bayliff; but it is according to the different course of the Courts.

Two Exceptions were taken to the Return of a Rescous:

1. *Feci Warrant*, but saith not *sub sigillo Officii*. *Non allocatur*, because he saith *feci Warrant* directè, and its not a Warrant unless it be *sub sigillo*.

2. It was not returned, That it was *extra custod* of the Sheriff, but of the Bayliffs. *Sed non allocatur*; for the Custody of the Bayliffs *Virtute warranti* of the Sheriff, is the Custody of the Sheriff, Sir Tho. Jones Rep. 195. Penfold's Case.

A Rescous was returned in this manner by the Sheriff; (*viz.*) in the Recital of the Arrest he said, *Mandavi ballivo, &c. qui virtute predicti Warranti arrestavit, &c.* and after shews the Rescous.

In the
Return he
makes no
mention
of his
Warrant.

Exception was, He Commands his Bayliffs to Arrest, and saith, That by virtue of the said Warrant they did Arrest, &c. and makes no mention of any Warrant, but of his Command to them. Had this been to a Bayliff of a Liberty it had been good; but not to those which are Bayliffs Itinerants.

But *per Cur.*, he cannot Command a Bayliff of a Liberty, but by his Warrant.

The Clerk of the Crown said, The Common Form is, *Feci quoddam Warrantum*; but to a Bayliff of a Liberty it is *Mandavi*.

A General Warrant to a Bayliff of a Liberty (*viz.*) for all Arrests is good; but not to a Bayliff Itinerant, by *Haughton*.

But by Sir James Ley Chief Justice, Tho^t the Common Form be *Feci quoddam Warrantum*, yet this tantamounts: For the Mandate of the Sheriff to the Bayliff is the Bayliffs Warrant. However a Rescouer as to this cannot take advantage, but shall be fined to the King, 2 Roll. Rep. 263.

The time
and place
where the
Warrant
was made,
not shewed
in the
Return.

The Sheriff returns a Rescous, and recites where a *Latitat* was to him directed, &c. he made his Warrant to the Bayliff, who arrested *W.* and that *G.* made the Rescous. It was held to be good, tho^t he doth not shew the time and place of the Warrant, 2 Roll. Rep. 255. *Webb and Wisbers.*

A Rescous was Retorned in this Form by the Sheriff:

CEpi corpus prædict. A. & idem A. fuit in custodia mea virtute brevis prædict. quousque B. C. & D. Vi & armis (tali die & anno) in E. & F. ballivos meos insultum fecere vulneravere & male tractavere, & A. de custodia mea adiunc & ibidem rescussere.

And two Exceptions were made:

1. He doth not shew any Warrant made to the Bayliff. *Per Cur'*. The Prisoner is alledged to be in custodia of the Sheriff, and the Rescous to be from him, and therefore need not speak of the Warrant; and this that is spoken of the Bayliff is Surplusage. Mention no Warrant.

2. The Rescous is not well retorned, because the Battery is alledged to be Vi & armis. *Per Cur'*. This is Surplusage, and the Rescous is not retorned to be Vi & armis, *Latch. p. 184.* Rescous retorned without Vi & armis.

Quære, If a Rescous may be retorned without Vi & armis?

But this Case is more truly reported by *Rolls*. If a Sheriff retorn, That he by force of a *Capias* took the Body of J. S. & ipsum habuit in Custodia quousque J. D. & J. N. Vi & armis. such a day, insultum fecer' in W. S. & W. N. his Bayliffs, & prædict. J. S. adiunc & ibidem è custodia sua rescusser' & prædict. J. S. seipsum rescussit. This is not a good Retorn, because it doth not shew that the Bayliffs had any Authority to Intermeddle: And to lay a Rescous without Vi & armis is not good; and the Vi & armis goes to the first Clause only, *Pasch. 3 Car. 1. Wilcox's Case, 2 Roll. Abr. 457.* Retorn qualtr.

The Office and Duty of Sheriffs, &c

The return of a Rescous was quasht for these Exceptions:

1. It is said, *Feci Warrantum meum Thomæ Taylor*; and does not say, *Tho. Taylor* was his Bayliff.

2. He doth not say, for what Cause he made his Warrant: And so it appears not, whether it was lawful or not, *Stiles Rep.* 159.

In a *Cap. Utlagat.* before Judgment, the Sheriff returned, That *J.S.* and *J.N.* rescoued the party. Its good without addition: For no Statute nor Book will compel the Sheriff to give Additions in this Case. And the Rescouers which were present were Committed to the *Fleet, Winch. Rep.* p.10.

Insensible
Return.

If the Sheriff return, That the party himself, *simulcum J.S. & J.N.* made the Rescous. It was said it was not good; because there is not any Averment that *J.S.* and *J.N.* rescued him. And if it had been, that *J. S. simulcum N. rescusserunt A.* it is not good against *J. S.* because it is *rescusserunt*, which is Insensible, *Mich.* 14 *Car.* 1. *B. R.*

Rescue by
several
returned.

Return of a Rescous was excepted to, because it is said *quod adtunc è custodia ballivi ceperunt & rescusserunt*; and doth not say, *& quilibet eorum rescussit. Sed non allocatur*: For it shall be intended all of them did it; and tho' their Fines are several, their Offence shall not be intended so, *2Keb.* 436. *Le Roy* versus *Suffield.*

Rescous was returned by a Sheriff upon Arrest by special Bayliffs *hac vice*, (*scilicet*) That *Cooke* and seven others made Assault upon the Bayliffs, &c. and the party Arrested *cepit & abduxit*,

abduxit, where it should be *ceperunt & abduxerunt*. *Per Cur.* The Retorn is good against Cooke, and void against the rest; and Cooke (against whom the *Capias* issued) was admitted by his Attorney to make fine, which was 6 s. 8 d. *Lit. Rep. p. 2.*

A Bayliff of a Liberty hath Retorn of Writs, ^{Rescue} and therefore a Rescous made from him must ^{from a} be retorned, to be out of his hands. But a ^{Bayliff of} Rescous made from the Sheriffs Bayliffs, must be ^{a Liberty,} expressed to be out of the hands of the Sheriffs ^{how to be} Bayliff; for the Bayliff is but the Sheriffs Servant. But as to this last, it is not Law, *vide supra*, *Stile's Rep. 417.*

The Retorn being made by the Bayliffs of a Franchise, and saying *à custodia sua*, is not good, unless he saith *meū*, 2 Keb. 177. *Le Roy* versus *Claypoole*.

The Sheriff made a Warrant *Ballivis suis*, to arrest such a man, and the Bayliff of the Liberty retorns a Rescous; yet its good, *Marsh. Rep. p. 25.*

R. and W. were retorned by the Sheriff, to have made a Rescous upon such a Bayliff, to whom he directed his Warrant to execute his Writ. *Per Cur.* This Retorn is insufficient, because it doth not appear that the Bayliff had *Retorna brevium*, which ought always to be mentioned on the Sheriffs Retorn. And this must be so, if he retorn it as the Retorn of a Liberty: But here in the principal Case he retorns it in his own Name, wherefore it shall be intended it was his own Bayliff; and tho' he name him in his Retorn, as Bayliff of a Liberty, yet that is but a void addition, *Cro. El. 780. Lady Russel and Wood.*

^{Rescue}
^{from the}
^{Bayliff of}
^{a Liberty,}
^{how to be}
^{Retorned}
^{by the}
^{Sheriff.}

Tho'

Tho' the Sheriff arrests a man within a Liberty in the same County of which he is Sheriff, and the Prisoner is rescued, yet the Rescous is unlawful; because the Arrest is good, and its no Offence unless it be to the Lord of the Liberty, *Yelv. p. 51. Winch's Case*, cited in *Woolfreston's Case*.

Retorn of
Rescous
on mean
Process.

Retorn of a Rescous or Mean Process was quasht, because it saith *ad Largum iuit quo voluit*, and not *ad Largum quo voluit ire permiser*, 2 *Keb.* 318. *Le Roy versus Lisse*.

Forms of Retorns of Rescous, *vid. Dalton* 215, 216.

Rescous.

Of Laying the Action, Declaration and Pleadings.

By Bayliff
of a Li-
berty.

A Warrant was from the Sheriffs to the Bayliffs of the Liberty of *Pomfret*, who did Execute it, and there was a Rescous: And the Bayliff may have the Action against the Rescuers in his own Name; but he failed in proving it to be a Liberty, and was Nonsuited, &c. And Note, He was put to it first to prove the Liberty by Records. *Foster and Legard's Case* at York *Affizes*.

Arrest in
one Kings
time, and
Rescous in
another's

B. brought out a *Latitat tempore Eliz. versus E.* who was served in the time of King *James*, and *E.* rescued himself, and the Rescue was returned by the Sheriff of *Essex*. *Per Cur.* This is good; for a *Latitat* is within the Statute of 1 *Ed. 6.* and is not lost or abated by the Demise of the Queen: For its not any Original Writ, but is in the nature of an Execution, grounded on a Record precedent, *viz.* upon a Bill of *Middlesex*, so that the *Latitat* issues upon a Suit depending; and the Arrest was good, and so the Rescous, *Yelv. Everard and Blach.*

Latitat,
the nature
of it,

In

In the Declaration the time of the Arrest must be shewed upon which the *Rescous* is supposed to be made; and it must be shewed, that the Party *Rescoused* was in Custody of the Serjant, or Sheriff from whom he was rescued, *Stiles Rep. 432. Gough and Cann.*

The Plaintiff Declares, Whereas one S. was indebted to him by Bond in 300 l. and for Non-payment he Sued a *Latitat* out of the *King-Bench* directed to the Sheriff of, &c. to Arrest him, returnable at such a day, intending upon his appearance, and Bail put in according to the Course of the Court, to Declare against him, (and shews the Course and Custom of the Court, that he upon appearance should put in good Bail, that if Judgment were had against him he should satisfy the Condemnation, or render his Body in Execution) That he delivered the Writ to the Sheriff of *Nott*, who made a Warrant to the Bayliff of the Kings Liberty of *Newark* to execute it; which Warrant was delivered to the L. Deputy of the Lord *Burleigh, Balliui Libertas Domini Regis Wapentagij sui de Newark*; who by force thereof Arrested the said S. That the Defendant rescued him out of the Custody of the said Deputy, and he Escaped, &c. Errors moved in the *Exchequer Chamber*.

First, Because the Custom of the *Kings-Bench* is alledged to be, that if any one Arrested comes *sub Custodia Vicecomitis*, he shall put in Bail, which is not so, for he shall be in *Custod' Marr'* and no Declaration can be against him *sub Custodia Vicecomitis*. But *non allocatur*, that which is alledged of the Custom of the Court is Idle.

Custom of
the Court
of putting
in Bail.

U

Secondly,

That he
was rescued
from the
Deputy of
the Bayliff
of a Liber-
ty, good.
Difference
between
Action on
the Case,
and Re-
torns and
Indictments
of Rescues.

Secondly, It is said, he was rescued from the Deputy of the Bailiff; where it ought to have been from the Bailiff himself, or from the Sheriff: *Sed non allocat*, for there is a diversity in this Case, which is an Action on his Case, wherein he shall shew the Truth, as in *rei veritas* it is, and not as it is upon the Retorns of Rescues and Indictments, which say it is done to the Sheriff or Bayliff himself, *Cro. Jac. 241 Kert and Ellwin*. Like the Case of *Burgh and Apleton Sheriff of Essex*, *Lanes Rep. 70. Mesme Case*. In that Case it was declared, That the Bayliff of a Liberty arrested the Party, and delivered him to the Sheriffs Deputy, and that he rescued him from the Sheriffs Deputy, *Dyer 244*. And Judgment *pro Querente* in that Case, and in *Lane's Rep. p. 70. Burgh and Apleton's Case*, in the same Case saith, that the course of the *Kings-Bench* is always so in Return of a *Rescous*, to be out of the hands of the Deputy Bayliff; notwithstanding *Dyer 7. El. 241*. And the Declaration was held good, that he sued an *Alias Capias*, without mentioning a *Latitat*, before this Arrest was made by the Deputy Bayliff of *Newark*. But the main Question was, Because it doth not appear, that the Bayliff had a Power in his Patent to make a Deputy Bayliff.

No Escape
upon a Tor-
tious Ar-
rest.

The Action is brought in *Suffolk* against the Sheriff of *Suffolk*, for Arresting the Defendant in the first Action upon a *Capias Utilegas* and suffering him to Escape, and the Defendant in the first Action is named of *S. in Com' Norfolk*, and the Arrest is supposed *apud S. præd* so the Arrest is supposed in the County of *Norfolk*, and then it is *Tortious*, and there is not any Escape thereon. *Per Curiam*, its an incurable Error, *Cro. Eliz. 887. Eden and Floyd*.

In Action for Case on a *Rescous*, The Plaintiff declares, that *A.* was indebted to him by Obligation of 20 *l.* and that he Sued a Writ against him directed to the Sheriff of *Cornwal*, to take *A. &c.* and that the Sheriff 1 *Off. 6. Car.* Arrested him at *L.* in Com' *Cornub'* and after the Defendant at *Westminster*, the *pra'd* 1 *die Octob.* rescued him out of the Custody of the Sheriff; and on *non culp'* Verdict and Judgment *vers. Quer'* he brought Error and Assigned this for Error, for that it was impossible he should be arrested at *L.* and the same day be rescued at *Westm'* (200 Miles distant,) yet the Court will not intend it to be impossible. But however, *see what Reasons the Plaintiff shall have to assign Error on his own Declaration*, 1 *Rolls Ab. 523. Kendal and Kendal.*

Trespass and Assault laid and tried in *Somersetshire*, the Defendant justified by Warrant to the Sheriff of *Dorset*, and that the Plaintiff endeavoured to rescue himself, and Issue *de injuria sua propria.* *Gold* after Verdict prayed Judgment, because within the words of 16 and 17 *Car. 2. c. 8.* there being three Judgments in the Point. *Wise and Adderly* in *C. B. Trin. 26 Car. 2.* *Croft and Winter*, and *Croft and Bays*: But the Court were not satisfied with these Judgments, and resolved that the Statute intended the Tryal where the cause of Action ariseth. But there was a *Replead*, because the Defendant Traversed *absque hoc*, that he was Guilty *aliter vel alio modo.* The reply was he was Guilty *aliter & alio modo*, which was a wild Issue, 3 *Keb. 552, 612, Masters and Wood.*

Declaration of Arrest at *L.* and rescue at *W.* the same day (being 200 miles distant yet not Error.

Tryal shall be where the cause of Action ariseth.

Pleading.

Diversity
between
pleading
Rescous in
Debt on
Escape.
Averment.

If not
Guilty may
be pleaded
to the Sher-
riffs Retorn
of Rescous.

In Action on the Case on Escape upon mean Process. Defendant Pleads a *Rescous* ever since, 6 *Car.* 1. It hath been held a good Plea. *Per Cur'* If it be retorned, its a good Plea, and it need not be averred in the Plea that it was retorned. But in Debt on Escape its no Plea, 3 *Keb.* 513. *Hill and Mountague Bayliff of West.*

In Action on the Case for a *Rescous* one may Traverse, &c. but *Quare*, if not Guilty may be pleaded to the Sheriffs Retorn of a *Rescous*, 1 *Keb.* 258. *Rast. entr'* 580. *le Roy versus Mayor of Hereford.*

Scire fac' to have Execution of a Judgment in Debt. Defendant Pleads, That at another time the Plaintiff had sued Execution by *Capias ad satisfaciend'*, and that he was taken thereupon. Plaintiff replies, True it is, he sued a *Ca. sa.* and the Defendant was taken thereupon, but he presently rescued himself and escaped. Replication is good, As there is no cause for the Defendant to have *Audis' Querela* when he is escaped and taken again, unless it be for a voluntary permission by the Sheriff, so there is not any bar for the Plaintiff to have new Execution; And tho' its no good Retorn on a *Ca. sa.* that the Defendant rescued himself (for the Sheriff at his own peril ought to have kept him) nor any Plea in Debt on Escape; yet the Party himself shall never take advantage of his own *Tortious Act*. And *Scire fac'* after the year is well maintainable, *Cro. Car.* 240, 255. *Robinson and Cleyton.*

Venue. Verdict.

Action on the Case on *Rescous* is out of the Common Rules of the Court to alter the *Venue*. But its in the discretion of the Court on circumstances to alter it, as Action brought against a Bankrupt may be brought in the County, or here where the Commission is awarded.

Where a Man may lawfully rescue himself, *1 Keb. 346.*

There is a difference between a Warrant of Record, and a Warrant or Authority in Law, for if a *Capias* be awarded to a Sheriff to Arrest a Man for Felony, albeit the Party be innocent, yet cannot he make *Rescous*. But if the Sheriff will by Authority which the Law gives him Arrest any Man for Felony who is not Guilty, he may rescue himself, *Coke 1 Inst. 161. a.*

Note, Four Nobles Fine, is a general Fine imposed for a Rescuer, *Sir Thomas Jones p. 198.*

In Debt *sur Escape versus Vic.* Plaintiff declares, That J. S. and his Wife were in Execution, and that she escaped. On *nil debet* special Verdict found, that the Baron was in Execution and that he escaped; and further, that the Wife was not taken in Execution, (being for Debt contracted before Coverture.) Yet Judgment *pro Quer.* the Verdict was not in the whole pursuant to the Declaration, because they found the Husband Escaped, *1 Siderfin 5. Roberts and his Wife against Herbert.*

In Action on the Case upon a *Rescous* and Escape: The Jury find the Debt due to the Plaintiff, the prosecuting the *Latitat* for this Cause, the making the Warrant hereupon to the Sheriff, &c. *Cro. Jac. 485. Hodges and Mark.*

C H A P. XXI.

Of Escapes. Some Maxims and Diversities premised. Escapes, as to Mean process, and as to Execution. What shall be or amount to an Escape of a Prisoner out of Execution, or not. Of Escapes in respect of the Old and New Sheriff, and of the Prisoners being delivered over. What thing or act shall excuse an Escape, or in what Cases the Sheriff or Gaoler shall not be Answerable for an Escape. Of Erroneous Process. Where the Escape of one shall not be the Discharge of the other; and where the other shall have Audita Querela, or not. Actions of Debt, or on the Case, by the party against the Sheriff for an Escape, and who shall have such Action. To whom it shall be said an Escape, or not, at Election.

Of Escapes.

ESCAPE is where one that is Arrested, or Imprisoned on the Arrest, comes to his Liberty before he is delivered by Order of Law.

But before I treat of Escapes, it will be very advantagious for the better understanding thereof, to set down some few Diversities, which will help to settle ones Judgment in reading and considering the Cases ensuing.

Diversities.

Diversities.

1. Between a Negligent, and a Voluntary or Permissive Escape. A Permissive or Voluntary Escape is by the assent, privity and knowledge of the Sheriff, Gaoler, &c. *Vide postea*, Where the Prisoner may be retaken or not.
2. Between an Escape on Mean Process, and on Execution. In Escape upon the Arrest by the same Process; as a *Cap' ad respondend'*, the Writ ought to surmise *ad largum ire permittit*, & *non comparuit ad diem*; because the party was Bailable, and the Sheriff might suffer him to go at Large. *Aliter*, if the Arrest be upon Execution; as a *Cap. ad satisfac.* There *permittit ire ad largum* is good enough. *Noy 72. Sheriff of Nottingham's Case. Vide infra.*
3. Between an Escape for Debt, and for Felony or Treason.
4. Between an Escape by a Sheriff or Bayliff, and an Escape caused by Rescouers. A Rescouer shall be charged with the Debt. The Sheriff or Bayliff for a Negligent Escape shall be charged with the Damages only in the same Plea, as the Writ supposeth, and not with the Debt, *Lanes Rep. p. 70.*
5. Between an Escape in Fact, and an Escape in Law: As where a man may be in Custody without actual Arrest.

6. Between Error in the Proceedings and a Nullity of the Record, and how the Sheriff shall take advantage of either.
7. Between an Escape in the Life of the Testator, and an Escape in the time of the Executor, upon Execution in the time of the Testator.

Note, If Judgment be Reversed before Action of Debt brought for an Escape out of Execution, the Action is gone, 1 Sand. 38. Jones and Pope, 8 Rep. 142. Dr. Drury's Case.

Note, It was said by Twissden, in 16 Car. 2. B. R.

'The occasion of so much liberty in the
'Marshalsea is, that the Marshal is not charg-
'able but by Bill, which must bear Teste in
'Term time; and so in the former Term the
'party is not Escaped: And by the first Day
'of the later Term the Prisoner generally is to
'return to Prison, and so no remedy for the
'party, 1 Keb. 794.

Of Escapes as to mean Process.

Where a
man may
be in
Custody
without
actual
Arrest, an
Action for
the Escape
shall be
good.

When a man is in Custody of the Sheriff by Process of Law, and another Writ is delivered to him to take him, presently in the Judgment of Law, he is in his Custody without actual Arrest, *quia Lex non praecepit inutilia*; as A. recovered in Debt; Defendant was Outlawed, and after the year the Plaintiff procures a *Capias ntlag* and delivers it to the Sheriff of London, after the Serjeant Arrests the Defendant to answer I. S. before the Sheriff, the Plaintiff delivers the

the Sheriffs Warrant to the Serjeant (who had the Defendant in his House) to Arrest the Defendant, the Serjeant refuseth, and after the Sheriff suffers him to go at Large; Plaintiff brought Action against the Sheriff, supposing he had Arrested him, and Defendant plead *non permisit, &c.*
5 Rep. Frost's Case.

By *Windbam* in *Benskins Case*, by Law the Bayliffs ought not to hurry away any immediately to Prison, but he may call any other persons in aid, and so may commit the Prisoner to them. *1 Keb. 483. Benskins Case.*

If by assent the Sheriff suffer me to go at Large no Action lies for the Escape.

Of Escape out of Execution.

What shall be said an Escape of a Prisoner out of Execution for Debt or not.

If a man in Execution be suffered to go at Large for a time out of the County, and to return again, and this upon Bail or Mainprise, yet this is an Escape, for he ought to be kept in *arcta custodia*. So if he be suffered to go at Large to any place within the County, and to return again, so if he be suffered to go at Large within the same Town where the Prison is, it is an Escape, tho, he return within his time. *Plowd. 36. b. Platts Case. 3. Rep. 44. Boyntons Case. Hob. p. 173. Earl of Essex.*

The Case was, *A.* recovered upon a Plaint in London against *B.* and had him in Execution in Ludgate. *A.* died Intestate. *B.* was permitted by the Keeper of Ludgate to go at large into Southwark with *J. S.* Servant of the Keeper, and by the Command of the Keeper. The Administrator

frator of *A.* brought Debt against the Sheriff of *London* upon the Escape. *Per Cur.* It was an Escape. He that waited upon him into *Surry* could not be Officer to the Sheriff of *London*, and so he had no Keeper: For the Power of a Sheriff does not extend beyond his own County, unless in Special Cases. And the party might have Action of *False Imprisonment* against him, tho' the *Baston* or Servant waited on him there; being Voluntary, *Dyer* 166. *accord.*

If the Sheriff removes his Prisoner out of the County without being commanded, 'tis an Escape, and if he remove Prisoners for ease and delight in the same County, it is an Escape, as a Prisoner went to a Bearbaiting with his Gaoler in the same County, and it was adjudged an Escape; so if the Sheriff permit his Prisoner to go to work, 'tis an Escape. *Hesly. p. 34.*

To suffer a Prisoner to walk in the Town, tho with a Keeper, is an Escape, unless it be upon a *Habeas Corpus* from a Court of Justice *Hob. p. 202.* If the *Habeas Corpus* bear *Teste* in the end of one Term retournable in another, this Writ will not warrant the Prisoner to go at Large in the Vacation, *Hob. ibid. Balden and Temple's Case;* for tho the Sheriff may remove his Gaol from one place to another within his Bayliff-wick, yet he must keep it and his Prisoners within it, and not suffer them to go at Large out of the Prison, tho he himself be attending on them, without an *Habeas Corpus* from some Court of Justice. And let Keepers of Prisons beware when they receive an *Habeas Corp.* from the Chancery or any other Court bearing *Teste* in the end of a Term to have the Body of one in Execution in the Court the next Term, that they do not by Colour of such Writs suffer the party to go at Large all the mean time (as it is some-

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times practised) for the Writ warrants no more than that he be brought out of Prison only for that purpose, and only for so much time as in Judgment of Law as shall be convenient and necessary for the Execution of the Writ and no more, which in *privilegiis odiosis* must ever be strict.

By *Hales* in *Lutterel and Mosedell's Case*, an *Habeas Hab. Corpus* out of that Court to which the party *Corpus* is a Prisoner doth justify the Gaoler in Assise-time, but otherwise if it be out of any other Court; but out of which soever, if the Authority of the Writ be Executed either in Time or Place at the pleasure of the Gaoler or Prisoner 'tis an Escape, as being carried a month before the time, and staying a month after; also the *Habeas Corpus* being at a place and day certain, 'tis no pretence of stay at any other places, or *ultra*, to search Writings or to speak with Witnesses, and immediate is a convenient time without wilful delay, so is *Mod. Rep.* 116 tho the Sheriff be not bound to bring the Prisoner the direct way, yet he ought not to carry him round about a great way, for the accomodation of the party, if he do it is an Escape. 3 *Keb.* 305. *Lutterell and Mosedell's Case*, and *Mod. Rep.* 116. *Mosedell's Case*.

But upon this Point of the Prisoners being suf- *Diversity*.
fered to go at Large, there is a diversity to be well heeded. And that is,

Between one in Execution within the Franchise or County where the common Gaol is, where the Office of Sheriff or Bayliff extends, for there if the Sheriff, &c. assent that one in Execution shall go out for a time, altho he return by the time, or if he suffer him to go at Large by Bayl or *Baston*, it is an Escape. But when

The Office and Duty of Sheriffs, &c.

when the Sheriff, &c. is commanded by Writ to have the Body at *Westminster*, he may be a Keeper of him in another County as in the Case of *Bennet and Halscy Mo.*—3. Rep. 44. *Boyston's Case*.

*Habeas
Corpus ad
Recipiend.*

The Plaintiff was taken in Execution by the Sheriff of *B.* and by an *Hab. Corp.* he was brought to *Smithfield* by the Gaoler of *B.* and there at eight a Clock at night the Prisoner went into *Southwark* and none with him, and there continued all night, and the next morning he returned to *Smithfield* to his Keeper, and there continued with him till the return of the Writ at which day he brought him to the Lord Chief Justices Chamber at *Serjeants Inn*, and he returned his Writ, and the Chief Justice committed him to the *Marshalsea*, and it was adjudged to be no Escape in the Sheriff, so in *Burton and Andrews Case. Mo. Rep. Bennet and Halscy.*

For the effect of the Writ is performed to have him there at the day, and the Writ does not command him to bring him the usual way, but to have his Body at the day, and so if one be Sheriff of two Counties and had Arrested two by two several *Capias* in two Counties, he may bring one into the other County to have them both at *Westminster*, and may bring them the surest way.

*Habeas
Corpus ad
Testificand.*

If a Gaoler on an *Hab. Corp. ad Testificandum* bring one whom he had in Execution to be a Witness, by *Twisden*, it is an Escape, and so has been adjudged. In *Rolls* his time, the Court was moved for an *Hab. Corp.* for a Prisoner in the Kings-bench, that he might be a Witness in a Cause in *Darby Shire* at the *Affises*, but it was denied; but he said he knew it granted for one to be a Witness at a Tryal at *Guild Hall*, but at the Charges and Peril of the party, for whom he was to be a Witness if he Escape 14 *Car. 1. B.R.*

And

And in 24 Car. 2. B. R. *Adam's Case*, the Court granted an *Habeas corpus* for a Prisoner in the *Marshalsea* to Testifie in a Cause in *Middlesex*. But *Hale* Chief Justice said, He would never grant it in his Chamber, being but a private Person, and the party may escape, which would be remediless, *Siderfin p. 13. Fitz-Jeffreys*.

If one be in Execution in the *Fleet*, or other place, at the Suit of the King, or of a Common person, and the Warden or Gaoler (by the Command of the Lord Chancellor or Treasurer) suffer him to go into the Country with a Keeper to gather Money, the sooner to pay the King; and he goes accordingly, and returns to Prison again: yet this is an Escape as to the Common person; for the King himself cannot License a man to go so at Large, *Dyer 12 & 13 Eliz.* 297.

The King
cannot
License
one to go
at Large.

If one be in Execution at the Suit of the King in the *Fleet*, the Warden may suffer him to go to his Counsel with his Keeper. But not so in the Case of a Common person, *Savill's Rep.* p. 29.

A man is in Execution for Debt, and a Woman being Warden of the *Fleet* marries the Prisoner, This is an Escape; for that he cannot be his own Prisoner, nor a Prisoner to his Wife.

So if the Sheriff or Gaoler marry a Woman that is in Execution for Debt.

Sir Gervas Clifton's Case, cited 1 Leon. 237. in *Offley and Saltington's Case* was, He being Sheriff suffered one in Execution and in his Custody to go and see a Play; and the same was adjudged an Escape, and the party could not be in Execution again.

This

Habeas Corpus in regard of the Plague.

This Case was referred by the King to the Judges, *Trin. 12 Car. 1.* Whether in regard of the Plague *Habeas corpora* may be granted for the Prisoners in Execution in the Prisons of the *Kings-Bench* and *Fleet*, upon Judgment in the *Common-Bench* and *Exchequer*; and it was Certified by them to the Lord Keeper, that if upon *Habeas corpus* granted the Gaoler suffers the Prisoners to go at Large with a Keeper or Baston, that this is an Escape, and that no *Habeas corpus* ought to be by the Law for this purpose, which the King well approved of.

And in *primo Caroli* the Prisoners in the *Fleet* petitioned the Parliament, that they may have *Habeas corpora* in the Vacation, in respect of the great Plague in *London*; but the Parliament would not assent to it, because against the Law.

Execution served upon one who is Prisoner for Felony, and then an Escape.

A *Capias ad satisfaciend^u* is served upon one, who is a Prisoner for Felony, and Indicted, and Arraigned, and found Guilty, and afterwards Escapes. Debt lies against the Sheriff; for the Execution was well served upon him, and altho' his Body was at the Queens pleasure; yet he shall not take advantage of his own *Tort*, but he shall answer the Suit or Execution of a Common person, *Cro. El. 165, 517. 1 Leon. 87, 236. Ognel and Passon.*

Delivery upon a void *Audita Querela* is no Escape.

The Sheriff delivers the Prisoner upon a void *Audita querela*. This is no Escape, and there the Prisoner may be taken again in Execution, *Mo. 344. n. 479. Collins's Case.*

But if a *Scire facias* had in it the words of *Audita querela*, its against Law, and its an Escape if the Sheriff deliver the Prisoner upon it, *1 Roll. Rep. 383.*

A forged Warrant of Attorney for Satisfaction is delivered into the Office where one is in Execution, and the Marshal lets him go. Its an Escape, unless the Attorney's hand were to it, or a *Superfedeas* delivered, 1 Keb. 873. Collet's Case. One delivered upon a forged Warrant of Attorney for satisfaction

If a man recover against *Baron and Feme*, and take both in Execution, and after the Wife is suffered to Escape; tho' the Husband continue in Prison, yet Debt lies upon this Escape against the Sheriff, in which all the Debt shall be recovered; for this was the Debt of the Wife, and she is as fully in Execution as the Husband: And Debt lies on it as well as Action on the Case. So if the *Feme* be only taken in Execution, 2 Bulstr. 320. 1 Roll. Abr. 810. Dr. Sutloff and Sir G. Reynel, 3 Bulstr. 150. 1 Roll. Rep. 204, 205. Cro. Jac. 657. Whiting and Sir George Reynel. Debt lies upon Escape of the Wife.

Where the Sheriff shall be so chargeable with a Prisoner, as to Escapes; Where the Action will lye, and in what Cases not.

The Entry of a *Committitur* upon the Roll shall not charge the Marshal for Escape (if there be any after) for then it should be in the power of every Attorney to charge the Marshal. A *Committitur* was Ruled to be vacated, to the intent the Plaintiff should be at liberty to take out what Execution he will. But if the party after such *Committitur* entred be in the Marshals Custody, and then escape, the Marshal shall be charged for Escape, Siderfin 220. Conny and Jacob. In respect of the Entry on the Roll of Committitur.

Therefore let the Student beware of the Opinion in Keble (1 Keb. 775.) in this Case of Conny's, where he tells you, the Entry of a *Committitur*

The Office and Duty of Sheriffs, &c.

mittitur alone is sufficient to charge the Marshal, as in Execution for Escape of a Prisoner, without actual proof of his being in Execution. But the better Opinion is in 1 *Keb.* 375. in *Pettyware and Hamson's Case*.

The Course has been always of late, that in case *Committitur* be entred on Record, yet it must be proved he was in Custody since that time; because it is the usual Course to enter a *Committitur* against every Defendant, tho' he be upon Bail.

Wherefore the Court ordered the Marshal to shew, whether one were in Custody or not.

Capias ad satisfaciend' was delivered to the Sheriff *versus J. S.* and after the Sheriff did arrest *J. S.* by force of a *Capias Usagat'*, and then the party in the *Capias* came to the Sheriff, and prayed that the party may remain in Execution for his Debt also. And the Sheriff suffers him to go at Large, and upon both Writs Returned *Non est inventus. Per Cur.* The Sheriff was not bound in point of Escape to detain the Prisoner for the Debt of the Plaintiff in Escape; and it is not like where one is in the *Fleet* for Execution, there, if other Condemnations in other Courts be Notified to the Warden of the *Fleet*, he shall be chargeable with them all, 1 *Leon.* 263.

Scire facias lies not on the Escape of a Bail, if no *Scire fac'* issued out against him; for the Sureties ought not to be taken in Execution presently. The Condition of Recognizance of Sureties is, That they bring in the Defendant, if he be Condemned, or to pay the Debt. Now if no *Scire fac'* issues out against him, the Surety being taken cannot plead the Release of the Plaintiff, or the death of the Defendant in his Dis-

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Discharge, as he might do upon *Scire facias*,
2 Leon. p. 29. *Devered and Ratcliff*.

*Of Escapes as to the Old and New Sheriffs, and
Delivering over.*

The Sheriffs of *London* by Indenture deliver Escape in Law.
over *J. S.* (in Execution at the Suit of *A.* and *B.*
severally) and only mention the Execution of
A. J. S. escapes; *B.* brought Debt against the
ancient Sheriffs on this Escape. It well lies:
For he cannot be in Custody of the New Sher-
iffs for this Execution; because they were not
charged with this Execution, and the fault was
in the Old Sheriffs that they omitted this Exe-
cution of the Plaintiff in their Indenture; and
the Escape began *eo instante* that the Ancient
Sheriff delivered the Prisoner to the New, for
then they cease to have the Custody of him,
and although he remain in the Rules of the
Prison, its an Escape in Law, 3 Rep. *Westby's*
Case.

The Old Sheriff Arrested one upon a *Latitat*, and
at the day Retorned *Languidus*, &c. and afterwards
in exitu ab Officio suo delivered him to the New
Sheriff, as a Prisoner for this Cause, and the
New Sheriff suffered him to go at Large. This
is an Escape in the New Sheriff, and an Action of
the Case lies against him; and tho' the other
Sheriff retorned *Languidus*, &c. yet this is not
material to the Plaintiff, he remains always in
Prison, Cro. Jac. 380. *King versus Sir Eusebius*
Andrews.

If the Sheriff takes a man in Execution, and
after a New Sheriff is made; and before the
other Sheriff delivers over, the party who was
in Execution escapes. The New Sheriff is not

X

chargable

chargable for this Escape, but the Old Sheriff; for the New Sheriff is not chargable with any Prisoner before delivery to him, 2 *Roll. Abr.* 457. Sheriff *Skinner's Case*.

One in Execution is willingly let go out of Prison by the Gaoler, and then came into the Gaol again; then a New Sheriff is, and then he makes Escape.

By *Hobart*, on a Trial at *Guild-Hall*, the New Sheriff cannot be chargable with him, nor answerable for him, as in Execution; for the Execution by such Escape was utterly discharged. Neither can two Sheriffs be Answerable *simul & semel* for two Escapes, out of one and the same Execution at the same time, *Hob.* 202. Sheriff of *Essex's Case*.

One taken in Execution on *Ca. sa.* by the Under-sheriff, he took Money of him for the Execution and let him go: Then the Sheriff dies and a New Sheriff is, and the same Under-sheriff; and a new *Ca. sa.* is taken out against the party, upon which he was Arrested again, and escaped.

By *Hobart*, the New Sheriff is not Answerable, the second taking in Execution being never lawful, *Hob.* p. 202.

If the Old Sheriff keep any Prisoner after he is discharged of his Office, its an Escape, 2 *Leen.* 54. *Smallman and Lane*.

If one taken upon a *Cap'* Escape, and the Sheriff die, and a new Sheriff be made for the remainder of the Year; then the same person is taken by another *Cap'* for the same Cause, and Escape: This will not charge the new Sheriff, *Hob.* p. 202.

If the Prisoner walk abroad and returns in the time of one Sheriff, and escape in the time of another Sheriff; this is no Escape in the time of the second Sheriff, *Hob. 202.*

A. was taken in Execution in the time of the Old Sheriff, and then escaped, and afterwards in the time of the new Sheriff the Plaintiff again sued a *Scire facias* against *A.* upon the said Judgment: Upon which Execution was awarded by Default, and thereupon issued a *Cap. ad sat.* against *A.* by which he was taken, and escaped. *Per Cur.* The new Sheriff shall be charged; for tho' *A.* was in Execution, which was determined by Escape in the time of the Old Sheriff, yet when new Execution was awarded against him upon his default in the *Scire fac.* the same shall bind the Sheriff, out of whose Custody he escaped, *1 Leon. pag. 3. Gibbert and Sir George Hart.*

New Sheriff shall be charged in Escape upon a new Execution.

What thing or Act shall Excuse an Escape, or in what cases the Sheriff or Gaoler shall not be Answerable for an Escape.

If the Sheriff Arrest a man upon a *Latitat* or other mean Process, and the Prisoner is Rescued from him before he be carried to Prison, and the Sheriff returns the Rescous against the Rescousers, this shall excuse the Sheriff in *Action sur case* upon Escape, because he is not bound neither is it convenient for him to bring a *Posse comitat.* with him to serve every mean Process. But if the Sheriff bring him to the Gaol, and after he is Rescued out of Prison, and he returns the Rescous, yet this shall not excuse the Sheriff, for he ought to keep his Gaol at his Peril. But if the Sheriff takes a man in Execution, as on a *Capias ad satisfaciend.* and he is Rescued before he

On Return of Rescous on Mean Process, the Sheriff shall be excused in Action of Escape.

brings him to Prison, tho he returns the Refcous, yet this shall not excuse him, for that he is to take a *Pesse Comitat.* and the party cannot have a new Execution. *Proby and Lumly.*

Now let us see whether, and how far erroneous Process shall excuse the Sheriff.

Tho the Process of the Court be Erroneous, yet the Sheriff shall not be chargable on Escape; as if first *Capias* be by a wrong name, and the *Testatum* by a right name; so if one who is in Execution by a *Capias ad satisfaciend.* on a Recognizance, tho the *Capias* is erroneously awarded, yet the Sheriff is Chargeable. Yet this is not Law, for a *Capias ad satisfaciend* lies on a Recognizance, as in *Ognell and Pastons Case.* 1 *Leon.* 2 *Bulst.* 25 6. *Keyfar and Tirrel.*

So of a *Capias* awarded without a *Fi. fac. Cro.* *Eliz.* 576. *Conyers Case.* *Cro Eliz.* 188 *Bushes Case.*

Diversity.

So that he is not to take advantage of Error in the proceedings, otherwise it is where he can alledge a nullity in the Record; and if the Court award a *Capias* where it lies not to the Sheriff, by force of which he takes the party, and then suffers him to Escape, he shall be charged, for he is not to dispute the Authority of the Court.

Diversity,
where the
Court has
Jurisdiction
of the
Cause, and
where not.

Another difference is, where the Court hath Jurisdiction of the Cause and where not; where the Court hath Jurisdiction, and doth Misaward Process, this is but Error: But if the Court hath no Jurisdiction and doth Misaward Process, there all is void, and the Sheriff may shew this in discharge of himself: As if a *Formedon* be commenced Originally in *B. R.* or an *Appeal* in the *Common-Bench*, all is void, and no Action of Escape lies against the Sheriff; as *Kingston* upon *Hull*

Hull is a limited Jurisdiction, and they hold Plea of a Bond made out of their Jurisdiction, and thereupon a *Capias* was awarded against the Obligor, who being Arrested on it, Escapes, no Action lies against the Sheriff, and this is the difference in the Case of the *Marshallsea*. But this is more fully reported in *Rolls Abridg.* 2. *Bulst.* 62. *Weaver and Clifford*, *Ognell and Parstons Case.* 8. *Rep.* 243. *Dr. Drury's Case.*

Action on the Case is brought in *B. R.* against the Officer in an Inferior Court upon Escape, if the Plaintiff declare that he brought an Action against *I. S.* in the said Inferiour Court (as *Kingston* upon *Hull*) on an Obligation made at *Halyfax* in *Com' Ebor'* and does not alledge this to be within the Jurisdiction of the said Inferiour Court, and upon this Judgment was given and Execution granted, and the Defendant took him in Execution and suffered him to Escape, and upon this he brings his Action. 1 *Roll. Abridg.* 809. *Richardson and Bernard.*

This Declaration is not sufficient to charge the Defendant, because it is not alledged, the Obligation was made within the Jurisdiction of the Court; for altho the Action be Transitory, yet this Inferiour Court had a Limited Jurisdiction of things arising within the Jurisdiction, and the proceedings there were *coram non Judice*, and utterly void, of which the Officer shall take advantage in this Action for the Escape.

Upon the whole we may see that the Case of *Warren and Clifford* is misreported in *Rel.* p. 42. where 'tis said, it was held by three Judges that the Action did not lie, because he was not a Prisoner by the course of Law, for he was in Execution upon a *Capias ad satisfaciend.* on a Recognizance, which lay not, but a *Sci. fac.* and therefore saith that Book, he being taken by *Cap.*

ad satisfaciend. he is not a Prisoner by Course of Law, for the Law has not ordained any such means to Arrest him, and he being in Custody without Warrant 'tis no Escape. But this is a double mistake, for a *Capias ad satisfaciend.* has been adjudged to lie on a Recognizance, and if it did not, yet 'tis but Erroneous Process, of which the Sheriff shall not take advantage.

Erroneous
Process,
because the
Warrant
varies
from the
command
to the
Sheriff of
Com. pal.
Lancaster.

In Case upon Escape against the Sheriff of Lancaster for suffering one *M. W.* to Escape out of Execution; and shews a Recovery against him in *B. R.* and *Cap. ad satisfaciend.* and a *non est Invent'* returned; and a *Testatum* that he concealed himself in the County of Lancaster, and a Writ was awarded to the Chancellor of the County Palatine of Lancaster, that he should command the Sheriff to take the said *I. M. ad satisfaciend.* &c. *ita quod* the said Chancellor should have him, &c. and that the Chancellor commanded the Sheriff that he should take the said *M. ita quod* the Sheriff should have him *coram Justiciariis*, &c. and the Defendant being Sheriff did thereupon Arrest him, &c. Error was brought because the Writ directed by the Chancellor to the Sheriff, was not warranted by the Writ directed to him, for it varies from the command, for it ought to have been that the Sheriff should have the Body before the Chancellor, *ita quod* that he should have him before the Justices, *Sed non allocat'* for tho there be Error in the Process, the Sheriff shall not take any advantage thereof, but having suffered him to Escape he is responsible to the party. *Cro. fac.* 288. *Burton and Eyre.*

So the Sheriff shall not take advantage of Error in the Process, as in *B. R.* the Plaintiff had Judgment to recover more than was due to him. *2 Sand. p. 100. Jaques and Lockart.*

To

To this agree *Fitz. Tit. bar. pl. 253.* Debt was brought against a Gaoler for Escape, who said the Sheriff did not deliver him lawfully to him: But *Per. Cur.* he is not to meddle, whether the Sheriff delivered him lawfully to him. So 21 *Ed. 4. 23. b.* Action against a Gaoler for suffering one condemned to go at Large, 'tis no Plea to say that the Process was discontinued before the Judgment given, for he was a stranger to it. *Dier 66. 15. 4 Rep. 84. Southcotts Case.*

Process discontinued.

If the Prison be broken by the Kings Enemies, this shall excuse the Sheriff from Escape, for the Gaoler could not resist them, and he can have no remedy over; but if a Prison be broken by Rebels and Traitors within the Realm, so as the Prisoners Escape, this shall not excuse the Escape, for the Gaoler may have his remedy over.

Prison broken by the Kings Enemies shall excuse the Sheriff, not if done by Rebels and Traitors. Escape by sudden force shall excuse the Sheriff.

If the Prisoners Escape by sudden Fire, this shall excuse the Sheriff, for it is the Act of God. *Dier pl. 66.*

Where the Escape of one shall be a discharge of the other or not, and where the other shall have Audita Querela or not, *Vide Supra.*

Two are bound jointly and severally, and one is in Execution, and the Gaoler suffers him to Escape voluntarily, this cannot be pleaded by the other, for it is no discharge of the Debt, and by consequence the Action lies against the other; now where two are bound jointly and severally, one was condemned and taken in Execution, and after the other was sued condemned and taken, the first Escapes, the other shall not have *Audita Querela*: Because it must be an Execution with satisfactio; and tho the first may have Debt on Escape against the Sheriff yet

*Audita
Querela.*

there ought to be satisfaction in Fact before *Audita Querela* lies, and perhaps the Sheriff is worth nothing. And if the Defendants were sued by one Writ and several *Præcipes*, altho' the Entry should be *Quod unica fiat Executio*, this is intended to be with Satisfaction; for he shall have both their Bodies. But if two are taken in Execution for Debt, and one Escapes, Debt lies against the Sheriff; and after the Debt recovered against the Sheriff, or against the other, the other which remains in Execution shall have *Audita Querela* to be relieved; but the Body taken in Execution is no satisfaction for the Debt, 6 Rep. 86. *Blomfield's Case*, Cro. Jac. 351. *Pendarvis's Case*, Cro. El. 478. 2 Bulstr. 321.

And so is *Hobart* expresses; The Escape of one joynt or several Obligor, where both be in Execution, shall not discharge the other, *Hob. p. 2. 59, 60.*

And therefore the Escape of one in Execution, where two are bound in a Bond, is no Plea to the Bond; and tho' he escaped by the voluntary permission of the Sheriff, so as the Plaintiff is entituled to an Action against the Sheriff, yet that shall not deprive him of his Remedy against the other Obligor: But if he had pleaded, That the Sheriff suffered him to go at Large by the License of the Plaintiff, it might have been pleaded in Discharge, Cro. Car. 75. *Whitacre and Hankinson.*

Cap. Utleg. G. and A. were joyntly bound to T. in a Bond of 7000 l. The Obligee takes several Actions, and had two several Judgments, and sued both to Outlawry, and A. was taken upon a *Cap. Utlegat.* by the Sheriff of D. who voluntarily suffered him to Escape. T. brought Debt against the Sheriff, and Recovered and received satisfaction, and proceeded to take A. but A. brought

Audita

Audita Querela: And he failed in his Declaration, because the Satisfaction made by the Plaintiff to the Sheriff, was not Specially pleaded, (*viz.*) Time and Place where it was made; for it is Issuable, and it may be made after the *Audita Querela* purchased. But if *T.* had recovered only Damages in Action of Case for the Escape, the Plaintiff should have had no *Audita Querela*; but here he recovered his Original Debt in Action of Debt, grounded upon the Escape, *Mod. Rep.* 170. *Alford and Tornell*.

Difference
between
Action of
Debt and
Case.

The Escape of any one upon a Joynt Judgment and Execution, the Debt lieth for the whole; especially if they be in several Prisons, as *5 Rep.* 87. *Blomfield's Case*: Tho' the Duty wholly survived by the Death of the party escaped before any Action brought, and tho' the Executor of the party dead is discharged.

Any one
on Joynt
Execution
escapes,
Debt lies
for the
whole.

But if the Death of one before the Action brought, doth discharge the Escape. By *Hales* and *Rainsford* it doth not: By *Wild* and *Twisden* it doth, *3 Keb.* 305. *Lutterell and Mosedale*.

Of Actions on the Case, or Debt, by the party against the Sheriff, &c. for Escape.

If a Suit be in the Admiralty for a Matter arising *super altum Mare*; and upon this the Defendant is in Execution and escapes, the Plaintiff may have an Action for this Escape in B. R.

Where to
be ought

Action on the Case for Escape lies at Common Law; but no Action of Debt lay at Common Law, but the party was driven to his Special Action on the Case, which Action was grounded

grounded on a *Trespass* or *Tort*, and not upon any Contract in Deed or Law, 1 *Roll. Abr.* 536. *Brightrwight and Taylor*.

But now Action of *Debt* lies against the Sheriff or Gaoler for an Escape upon the Statute *W. 2. c. 11. & 1 R. 2. c. 12. 1 R. 2. c. 12.* gave Debt against the Warden of the *Fleet*; and so it is in equity against the Marshal: And tho' the Statute limits the Action to be brought by Writ of *Debt*, which is by Original; yet a Bill of *Debt* lies by the equity of these Statutes. And forasmuch as this Statute gives remedy by Debt, it gives Damages also: And this Act doth extend to *Feme Coverts*, and Keepers of Gaols for escape of Prisoners in Execution, 1 *Leon.* 17 *Cro. Jac.* 658.

Now we will consider Actions for Escape,

On } Mean Process,
Execution.

On Mean Process.

Case lies
on Escape,
on Mean
Process.

It is said, 1 *Roll. Rep.* 389, 440. Action on the Case lies not for Escape on Arrest in Mean Process; but upon Execution it doth.

But in 1 *Rolls Abridgm.* 99. If a man be arrested on Mean Process at the Suit of *J. S.* and he escape, *J. S.* shall have a Special Action against the Sheriff on this Escape, 1 *Roll. Abr.* 99. *May and Proby*.

If a man sue a *Latitat*, to the intent to Declare against the Defendant after Arrest in *Casted Mareſc* in Action of *Debt*, and the Sheriff arrests him, and suffers him to escape, an Action lies against the Sheriff shewing this Special

Special Matter, and he shall recover his Damages, having regard to the loss of his Debt, 1 Roll. Abr. 537.

And so is the Bayliff of Newcastle's Case. One brought an Action against J. S. before the Mayor, Bayliffs and Stewards of N. where the Bayliffs are the Gaolers of the Town-Prison, and J. S. is Committed to the Bayliffs on Mean Process for want of Bail, and they let him at Large before Judgment and Execution, and after the Plaintiff recovers against him. The Plaintiff may have a Special Action against the Bayliffs for the Escape; for by it he is deprived of the speedy means to have him in Execution after the Judgment, 1 Roll. Abr. 99. The Bayliffs of Newcastle's Case.

On Executions.

If the Sheriff suffers one taken by him in Execution to Escape, the party at whose Suit he was taken in Execution may have an *Alias capias* against the party that escaped, to take him again in Execution, or an Action on the Case against the Sheriff, *Pract. Reg.* 145.

If the Sheriff takes one by *Capias ad satisfaciend'* in Debt, if he after permits him to go at Large, and Returns not the Writ, yet Debt lies on this Escape; for there is a Record of which the party shall take advantage, tho' the Writ be not Returned, *Cro. El.* p. 16. *Clipton's Case*.

Action on the Case, upon Escape of one brought in Execution by force of a *Cap. Utlegat'*, is *tam pro dom' Rege quam pro seipso*; and the party shall have all in Damages.

An

Declara-
tion.

An Action on the Case, *Tam pro dom' Regi quam pro seipso* was brought, for that he had a *Capias Utlegat'* after Judgment against *J. S.* and delivered it to the Sheriff of *D.* to execute it, who seeing *J. S.* and being desired to execute it, would not do it, but suffered him to go at Large, and afterward the said Sheriff Returned *Non est inventus. Per Cur.* The Action is well brought, and the King is to have the benefit thereof as well as the party. And in his Declaration he need not cite the whole Record, but begin at the Judgment *quod non recuperasset*; for it is but a Conveyance to the Action, and its not necessary to shew the whole Record; and it sufficeth to begin at that which is the Cause of Action, *Cro. Jac. 532. Parkhurst and Powell, Cro. El. 877. Eden and Floyd, Cro. Jac. 360. Baret and Winchcomb.*

Who shall have an Action of Debt or Case upon Escape, or to whom it shall be said an Escape, or not, at Election.

And this is to be considered in the Case of a *Capias Utlegat'*, or a *Capias pro fine*; or where one shall be said to be in Execution without prayer of the party, and where not.

On Cap.
Utlegat'.

If a *Cap. ad satisfac.* issue upon a Judgment in Action of Debt, and the Sheriff Return *Non est inventus*, and thereupon he is Outlawed; and afterwards a *Capias Utlegat'* issues out against him, upon which he is taken and Imprisoned, and after is permitted to go at Large; the party who recovered shall have Action of Debt upon this Escape against the Sheriff; for he was in Execution against him also, because he cannot have a new *Capias ad satisfaciend'*. And if he escape,

escape, altho' he was taken at the King's Suit, yet the party had such Interest in the Body, that he shall have Action of *Escape* against the Sheriff; and before the Plaintiffs Prayer to have him in Execution, he is in Execution at his election. So that if the Sheriff suffer him to go at Large before the Plaintiff hath determined his election, its an *Escape* against the Plaintiff if he will, and an Action of *Debt* lies, *Relv. p. 20. 1 Roll. Abridgm. 810. 5 Rep. Garmon's Case.*

A. recovers in Debt vers. D. in Banco Communi, and sues a *Capias ad satisfac.* and an *Exigi post cap.* and Outlaws the Defendant, who brought Error in B. R. and Judgment affirmed, and within the year a *Cap. Uslegat.* is awarded, and the Defendant taken, and the Sheriff suffers him to escape before the Return of the Writ; Action lies against the Sheriff. The Defendant here being taken by *Cap. Uslegat.* out of the Kings-Bench, shall be in Execution for the Plaintiff presently after the Arrest, if he will, altho' he was never brought into Court, nor the Court committed him in Execution for the party, *5 Rep. Garmon's Case.*

As to a *Capias pro fine,*

Note, In all Cases when the Plaintiff may have a *Capias ad satisfaciend.* and the Defendant is taken by *Capias pro fine*, he shall be in Execution for the Plaintiff, if he will, without Prayer: As, a *Capias pro fine* on Recovery in *Assumpsit*, and also a *Cap. ad satisfac.* returnable the same Term at one and the same Return; and as to the *Capias pro fine*, the Sheriff Returns *Cepi corpus*; and as to the *Cap. ad satisfaciend.* *Non est inventus.* If the Sheriff in such case takes the party by *Capias pro fine*, now upon this taking

taking he is in Execution for the party; and if the Sheriff let him go at Large, he shall answer for the Escape, 1 Leon. 51. Hudson and Leigh.

So if a man be taken by a *Cap. pro fine* for denying his Deed in an Action of Debt, and is suffered to go at Large, he who Recovers shall have Debt against the Sheriff; for the *Capias* is *ad respondend^u tam nobis quam parti*, 7 H.4.4.

So in Recovery on Forger of False Deeds, if the Defendant be Imprisoned for the Fine at the Prayer of the King's Attorney; if he be suffered to go at Large before satisfaction to the Plaintiff, he may charge him for the Escape, because he is in Execution to the party upon the Prisal at his election. For he ought to be in Execution at the Suit of the party, before Suit to the King; because the Suit of the party is the Original; and the Fine but accessory, because of the Suit, 7 H.6.6. b.

Where no
Capias lies
in the
Original,
he shall
not be in
Execution
before
Prayer of
the party.

But if a man be taken by *Capias pro fine* for the King, where no *Capias* lies in the Original, (as in *Affize* with Force, &c.) and suffered to escape before Prayer of the party to be in Execution for his Damages, the party shall not have Escape against the Sheriff, because he would not be in Execution for him before Prayer.

C H A P. XXII.

Action for Escape by Executors or Administrators, where it lies, or not. Against whom Action of Escape lies. Where Execution shall be after Execution on Escape; and where it shall not be a Discharge of Execution, but that he may be retaken again. Of laying the Action, and manner of Declaration in this Action. Where the Sheriff shall have his Action against the Prisoner that Escapes; and how to Declare.

Action of Escape by Executors or Administrators, and how to be brought.

IT is made a Question in *Jones 173.* and *On Mean*
Latch. 67. Lemason and Dixon's Case, Whe- *Process.*
 ther an Executor shall have an Action on the Case against the Sheriff for an Escape in the time of the Testator on Mean Process? But the better Opinion seems to be, The Executor cannot have any Remedy: The Escape being in the time of the Testator it is a Personal wrong to the party, & *moritur cum persona*, *Latch. 67. Jones 173.*

But on the other side it was said by *Dodderidge*, The Executor shall have this Action, and that it is within the equity of the Statute of 4 *Ed. 3.* for it is a Wrong, tho' upon Mean Process, and the *Tort* continues as to the Executor; for every thing which makes to the hindrance of the execution of a Will is a wrong to him, and the performance of Wills is much favoured in Law. And if this Action would not lye, it would be a mischievous case; for as soon as the Creditor dies

dies, the Gaoler may suffer the Prisoner to escape, because none may have Action against him.

Two Judges were against two.

Whitlock's diversity was, This Personal Tort may be considered in two respects; as a Crime punishable, and that is gone; or as a Tort to the party; and then it is but reasonable that the Executor should have remedy.

After
Judgment.

But it is agreed by all, according to *Fitzb. N.B.* 121. That if it were upon Escape after Judgment, that the Action would lye by the Executor; therefore *quære* as to *Wade's Case* 2 Keb. 616. The Executor moved for a *Scire facias* against the Defendant, escaped out of Execution in the time of the Testator, and that the *Committitur* then entred may be vacated. *Per Cur.* albeit the party or the Gaoler on Negligent escape, or the party on Wilful escape may take him again, yet not by a New Process or *Capias* after a *Committitur*; nor can the Executors have any Remedy.

But *Stile's Rep.* p. 32. *Boomer and Payt*, is positive, That the Administrator may have Action of Debt against a Sheriff for the escape of a Prisoner, suffered in the time of the Intestate. But this was in the case of Execution.

Diversity.

So that the difference seems to be where the Escape is on Mean Process, and where it is out of Execution.

Diversity
between
Escape in
the time
of the
Testator,
and the
time of the
Executor.

Another difference is, betwixt an Escape in the Life of the Testator, and an Escape in the time of the Executor upon Execution in the time of the Testator. And it is agreed for Law, That if a Prisoner escapes in the time of the Executor, the Executor may have Action of Debt.

But

BUT the Question is in Sir George Reynell and Langcastel's Case; and it is Adjudged, that it ought to be in the *detinet* only, for it is grounded on the former Judgment: And as an Action of Debt on the first Judgment shall be in the *detinet*; So here; and the difference was taken, Where the Action is grounded upon privity of Contract, it ought to be in the *detinet*. *Aliter*, when grounded upon a *Tort*.

It must be brought by Executor in the *Detinet*.

So is the same Case, *Hob. 272.* by the name of Langcastel and Sidley: If it were in the *debet* and *detinet*, the Plaintiff should recover for his own use.

So it is in *Stile's Rep. 32. Martin and Hendley*, and *2 Roll. Rep. 132.*

So Executor brings Debt upon Escape of one who was Bail in the Recognizance with, &c. to his Testator; it must be in the *detinet*, *Lane's Rep. p. 80. Carew's Case.*

Note, In Debt for Escape, brought by the Executor; if he be Nonsuit, he shall not pay Costs, *1 Roll. Rep. 63.*

Costs.

The Plaintiff brings Action on the Case as Executor against the Sheriff (Defendant) for Escape, and had Judgment given him *per nomen* of Executor. This Judgment past by *Non sum Informatus*. Error was brought, because the first Judgment was given for him as Administrator; and this in Action on the Escape, and the Judgment on it was *per nomen* of Executor.

Dodderidge put the Case:

The Administrator hath one in Execution for Debt, the Sheriff suffers him to escape; he brought his Action of Debt against the Sheriff for this Escape, and recovers; and after all he

Y

finds

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finds a Will, by which he himself was made Executor. The Recovery shall now be good, and this Money recovered against the Sheriff shall be Assets in his hands, and no *Audita Querela* in this Case lies against the Sheriff. And *Crook* of the same Opinion.

Houghton contra. If the first Executor dies Intestate, his Administrator shall not have an Action of *Debt* against the Sheriff for this Escape; no more shall the Executor here in the Principal Case have his Action against the Sheriff for the escape of him that was in Execution at the suit of an Administrator. The Executor here hath no privity to sue Execution upon this Judgment; because the *Scire fac'* depends on the Satisfaction, and to this he is not privy. The Court being divided, it was Compounded, 3 *Bulstr.* 112. *Slingsby and Lambert*, *Cro. Jac.* 394. 1 *Roll. Rep.* 276. *Godbolt* 262. *mesme Case.*

Action on
the Case
by Com-
missioners
of Bank-
rupts for
an Escape.

Action on the Case lies by Commissioners of Bankruptcy, for suffering one to escape who was Committed by them; because he refused to be examined, 1 *Roll. Rep.* 47. *Barnes and Cary.*

Against whom an Action for Escape lies.

Against
an Under-
sheriff.

If the Under-sheriff takes one in Execution, and suffers him to escape; Action of *Debt* lies against the Sheriff himself.

But there is a Case cited in *Marsh and Astrey's* Case, 1 *Leon.* 146. The Under-sheriff suffered a Prisoner to escape, and the Action was brought against the Under-sheriff: For (saith the Book) it may be the Under-sheriff himself had not Notice of the matter, (and I conceive, its no matter whether he had or not, he having Security from

from his Under-sheriff,) and the Writ was delivered to the Under-sheriff, and he took a Fee for it.

But this seems not to be Law: The Sheriff is the person in Court alone to answer all Misdemeanors of Under-sheriffs, or Bayliffs. Where Action lies against the Under-sheriff, or not. As the Under-sheriff lets one go that is arrested upon a *Latitat*, and Returns *Non est inventus*. No Action lies against the Under-sheriff; but the Sheriff shall not be Imprisoned nor Indicted for the act of the Under-sheriff, *Latch. p. 187. Laycock's Case.*

Yet *quare* of the Principal Case, *vid. supra sub tit. Under-sheriffs.*

Cap. ad satisfaciend is awarded to the Sheriff Action against the Bayliff of a Franchise, and not against the Sheriff. of *Berkshire* to arrest *J.S.* who was then in the Custody of the Mayor and Burgesses of *Windsor*, and he awarded a Warrant to the Mayor, &c. to take him, who did so, and after let him escape. Action of *Debt* for this Escape lies against them, not against the Sheriff.

And the like Law of a Bayliff of a Franchise.

Action of *Debt* is maintainable against a Not Gaoler or Sheriff for escape out of Execution: against the Sheriffs or Gaolers Executours. But it doth not lye against his Executors or Administrators. *Vide supra*, yet with this difference, *Dyer 271, 322.*

Where the Sheriff is chargeable in his Lifetime for a Personal Tort or *Misceasance*, there his Person is only chargeable, & *actio moritur cum persona*: But where he is chargeable for levying Money on a *Fieri fac*, and not paying it over; there, if he dies, his Executors are chargeable: It's a Duty, *Cro. Car. 539. Perkinson and Cullyford.* Difference between a Tort and Levying Money.

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Against a
Serjeant in
London.

A Prisoner taken on mean Process upon plaint before the Sheriff in *London*, is in Custody of a Serjeant, and escapes, the Action shall be brought against the Serjeant in this Case. *Siderf. p. 318.*

Action upon the Case, against Defendant being Sheriff of *London* on mean Process, and after Issue and Trial by *Nisi prius*, and before the day in *Banco*, one of them dies; tho they are reputed one Officer, yet they are 2 distinct persons, and the Suit shall proceed against the other, *Hard. 161. Harris versus Phillips and Briggs.*

Where Execution shall be after Execution upon Escape, or where an Escape shall not be a Discharge of Execution, but that he may be taken again.

Note, If the party negligently Escape, the party and the Sheriff may take him again; but if voluntarily, the only the party may take him again, but not the Sheriff; but if the Sheriff let him go by the consent of the Plaintiff, then neither can take him, 2 *Keb. 206. Alenlon and Butler.*

But tho the party or Gaoler on negligent escape, or the party on wilful escape may take him again, yet not by a new Process or *Capias* after a *Committitur*, 2 *Keb. 616. Wades Case.*

In case of
Sheriffs
death.

If one in Execution on *Ca. Sa.* escape of his own-wrong, yet the Plaintiff cannot have other Execution, *Hob p 6.*

If a Man taken in Execution by a *Capias* be put in Prison, and after escapes, and after the Sheriff dies, a new *Capias* lies against him, otherwise the Plaintiff would be without Remedy. But if a Man be in Prison, and the Marshall die, and

and then the Prisoner escapes, there is no remedy but to take him again; for if after the death of the old Sheriff, and before another is made Sheriff a Prisoner go at large, this is no escape, for he is in Custody of the Law, and may be retaken in Execution at any time, *Hob. p. 60. 41. Ass.*

15. *Mod. Rep. 14. 3 Rep. Westbys Case.*

On voluntary escape, the party doth not lose his Interest, but may take him again, and if the Sheriff die he may have a new Execution if he will.

So the Plaintiff Eexecutor brought a *Sci. fac.* on a Plea of Judgment in Debt for the Testator against the Defendant, *Quare Execution. habere non debet*, Defendant pleads he was taken in Execution *per Ca. Sa.* upon this Judgment, and committed to the Fleet, and that the Warden permitted him *ire ad Largum*. Plaintiff Demurs, and judgment given *pro querente*; and he may have new Execution against the Defendant, who escapes out of Prison, by 3 Justices *cont' Vaughan And Alanson and Busler* is full to the Point; Sir Thomas Jones *p. 21. Allen and Winter.*

2d Point, Whether *permisit ire ad Larg.* shall be implied *negligenter* or *voluntarie*, and it seems, 'tis not voluntary, because the Plea shall be most strongly taken against the pleader.

If *A.* be taken on Execution at the Suit of *B.* and voluntarily Escape by the assent of the Sheriff, and after the Sheriff retakes him and keeps him in Prison, he shall be in Execution to *B.* because tho *B.* may bring an Action against the Sheriff on this voluntary Escape, yet this is at his Election, for the party in Execution of his own wrong shall not put *B.* to his Action against the Sheriff against his will, and it may be that the Sheriff is not able to make him recompence, 10. *Car. B. Trevillian and the Lord Roberts*

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Case, Siderf. p. 350 Allanson and Butler.

So it is laid, tho' the Gaoler be Liable to an Action of Trespafs for the retaking, yet the Prisoner is in Execution, and the Reason given is, *The Body is a Pledge, and the Execution must be effectual.* 3 Keb. 453., 463. *James and Pierce.*

Voluntary Escape suffered only to gain Fees ought not to be countenanced, nor is no Plea in Bar, that the party was intended to return to Prison again at his day, and the Plaintiff has an Interest, which is not discharged by the Escape. But my Lord *Hobart* on a Tryal at *Guild-Hall* in the Sheriff of *Essex's* Case, was of another Opinion, the Case was; The Prisoner having been in Execution, was willingly let go out of Prison by the Gaoler, and then came into the Gaol again, and so remained in the Gaol till the time of another Sheriff, and then Escaped, and an Action of Debt was brought against the Sheriff, and he directed the Jury, that the Sheriff was not answerable to this Action, for when he was suffered by the Gaoler voluntarily to go abroad, the Execution was utterly discharged, so as he could not lawfully be taken again, nor adjudged in Execution by Law, tho the party would yield himself to it, or the Creditor should allow it, 2 Leon. p. 169. 162.

This is
since de-
nyed for
Law.

By volunt-
rary Ef-
cape suffe-
red by the
Gaoler the
Execution
gone.

If a Prisoner in Execution escape with the permission of the Gaoler, the Execution is utterly gone and extinguished, and the Plaintiff shall never resort to him that escapes, but shall hold himself to the Gaoler for his remedy. *Aliter* if he escape voluntary, or of his own wrong, *prout supra.* But the Law is now held otherwise against *Ridgways* Case, *Dr. Drury's* Case, and the *Earl of Essex* Case. But 'tis otherwise in case of a *Rescous*, *Hob. p. 202.* Sheriff of *Essex* Case, 2 Leon. 117. 162. *Phillips and Stone.*

In

In *Sci. fac.* to have Execution on a Judgment in Debt, Defendant pleads that at another time, the Plaintiff had sued Execution by *Capias ad satisfaciend.* and the Defendant was taken in Execution. Plaintiff replies, that true it is, he sued a *Capias ad satisfaciend.* and the Defendant was taken thereupon, but he presently Rescued himself and escaped. *Per. Cur.* the Replication is good, and it is no reason the Defendant should take advantage of his own wrong; tho' 'tis no good return upon a *Capias ad satisfaciend.* that the Defendant Rescued himself, nor any Plea in Debt or escape; and the Plaintiff may have as well his remedy against the party as against the Sheriff, and the party hath Liberty to begin again *de novo* by Action on the Judgment, or against the Sheriff. *Cro. Jac. 240. Robinson and Clayton, 1. Keb. 660.*

Permissive
Escape.

Rescous.

If a man upon a *Capias ad satisfaciend* be taken in Execution, and after Rescues himself from the Sheriff and Escapes, the Plaintiff may have a new *Capias* against him and take him again, the first Writ not being returned or filed, nor any Record made of the Award, and this on a *Sci. fac.* after the year, because he shall not take advantage of his own wrong; and so he may have *Elegit* or any other Writ: And so it is if the Sheriff had returned the Writ and Rescous, the Plaintiff may have a new *Capias* against him. *1 Rol. Abr. 904. Mounson and Clayton, and Radford and Hopkins.*

New Exe-
cution
upon Res-
cous.

If one in Execution Escape, and the Sheriff makes *fresh perquis* after him and takes him again, altho' it be a long time after, yet he shall be said to be in Execution again, because he shall not take advantage in his own wrong. *3 Rep. Ridgways Case.*

Fresh
suit.

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Where one is taken lawfully in Execution, and after discharged by Writ of Error, and after the Judgment is affirmed, a new *Capias* lies not against him, but Execution shall be awarded against his Sureties, if he will not render himself. But if the Execution is reverst, because he was never lawfully taken in Execution (as if he be taken after the year without any *Sci. fac.*) he may be retaken again, *Lach. p. 292.* Sir *W. Fish* and *Wiseman*.

Escape.

Laying the Action and Declaration.

Rule, Debt upon Escape ought always to pursue the first Action. Therefore, where the Plaintiff as Executor brought Debt against the Sheriff of *I.* on escape of *E. B.* against whom they recovered a Debt of 82*l* as Administrator of *I. S.* reciting all the Record in Certain: It is erroneous. For the first recovery was as Administrator of *I. S.* and the Debt on escape is as Executor of *I. S.* which cannot be; that one should die Intestate, and have an Executor, *Cra. Jac. p. 394.* Sir *H. Slingsy* *vers. Lambert.*

The Plaintiff declares against the Sheriff of *Devon*, for an Escape at *Exeter*, which is a City and County it self, and not part of the County of *Devon*, yet good after a Verdict, for it shall be intended the Defendant had the Custody of his Prisoner in *Exon* either by *Hab. Corp.* or on *fresh pursuit*, *Sider. 364.* *Hopping* and *Holmes.*

Action against one Sheriff of London, and declares, he was in Custody of both.

The Plaintiff declares that the party was in Custody of both the Sheriffs of *London*, and the Action is brought against one of them, the Prisoner that escaped being in *Ludgate*, in the Custody

Custody of the Defendant only, the Declaration is good, for the Prisoner was in Custody of both the Sheriffs, tho he was in the Custody of the Defendant; and it stands well enough with the Record, and the words *existen. in custod.* is a good Averment that he was in Custody, and the word *ut prefertur* do not hurt the Averment *Stiles, Rep 297. Drinkwater and Pack.*

Declaration.

Rule. *If the Party in his Declaration doth shew he hath no Cause of Action, in such Case if the Sheriff by force of a Capias to him directed, doth take the Party in Execution, and suffer him to Escape, no Action of Debt lies against the Sheriff for this Escape. But in Dyer 67. a. 2 Bulst. 62. 9.* Whether the Sheriff shall take advantage of the insufficiency of the Count.

In Action on Escape against the Sheriff or Gaoler, they shall not take advantage of the Insufficiency of the Count, but shall answer to the Escape: The same Law is of an Error in the Record or Discontinuance, because they are Strangers to it; no more than a Stranger shall falsifie a Recovery by matter Dilatory, *Dyer 67. a.*

Rule. *The Declaration in Escape ought to mention the first Judgment; or, the Plaintiff ought to shew he had recovered on Judgment. And it is not sufficient to say, qd' recuperasset. The Case was, qd' cum the Plaintiff recuperasset vers. J. S. &c. prout patet per Recordum, and that upon this a Capias issued out, and J. S. was taken by the Defendant and Escaped. It is too general; for non constat by the Declaration that any Judgment was ever given against him, and then he was not well taken in Execution, 1 Sanders 38, 39. Jones and Pope. Sider. p. 307. 2 Keb. 63. Mesme Case,*

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Case, 1 *Sanders* 34. *Carewells* Case. And tho' the Sheriff be in Contempt if he let him Escape, yet no Debt ariseth unless there were a Judgment; and tho' it be said the Sheriff took him in Execution, and for Debt *unde convict' est*; yet this is but a recital of the Writ.

Declaration in Escape may be according to the Writ (*viz.* that he Escaped out of the Custody of the Sheriff or Bayliff,) this is in Action on the Case, *Siderfin* p. 332.

In Case, Declaration, That the Sheriff, (the Defendant) had arrested *L.* at the Suit of the Plaintiff by a *Lat'* sued out of the Court the 21 of *January*, and that by the Escape the Plaintiff had lost his Debt of 119 *l.* Upon not Guilty the Jury find, that the Writ was Teste 28 of *Novemb.* But *revera* sued out of Court the 21 of *Jan.* and that *Habeas Corpus* was sued by the Plaintiff returnable *Mense Pasche*, with intention to declare then against the said *L.* But the Defendant upon another Writ of *Habeas Corpus*, without the assent or notice of the Plaintiff, sued and returnable *Tres Pasche duxit* the said *L. ad respond'* to the Plaintiff in *Trespas ac etiam bille* of 19 *l.* where the said *L.* was in Custody of the Defendant *ad respond'* the Plaintiff in *billa de* 119 *l.* and so the said *L.* was permitted to Escape. Moved in Arrest of Judgment, because the Action is founded upon an Arrest at the Suit of the Plaintiff by virtue of another Writ than the Writ found by the *Jury*; and the Plaintiff might have declared otherwise (*videl'*) that he had sued a *Lat.* Teste 28 *Novemb.* But *per Cur.* there is *veritas Legis & veritas Facti*, and the Declaration is according to the verity of the fact, and by necessity of Law, the Teste of the Writ ought to be in Term, and so is the course. Judgment, *pro Quer'*, *Sir Thomas Jones* Rep. p. 149. *Walbury and Saltonstal.* Tho'

Tho' it be not shewn that the Prisoner did not appear at the day, for if he did not appear then the Plaintiff was at no loss, yet that is not Error in the Declaration, for tho' he did appear, yet the *Tort* is not purged, *Cro. El.* 289. *Appleton and Burr.*

It is not necessary to be shewed that he did not appear at the day.

A Declaration is against a Sheriff, that he suffered his Prisoner to Escape, and had returned *Cepi Corpus & parat' habeo*, whereas *revera* he had not the Body at the Return of the Writ. *Quare* if this Declaration was for the false Return, or for the Escape, or for both,—To this Declaration the Defendant might have pleaded the Stat. of 23 *H. 6.* but he demurred generally, and so has lost the advantage of the Statute, which is a private Statute, and the Defendant has confessed the Escape by the Demurrer, *vide supra.* *Sanders* 154, 155. *Benson and Welby.*

So that if the Escape be well alledged, the Court will not countenance Error in other *Non Formalities.*

The Declaration was, whereas he had brought a Writ of Debt against *M. W.* and recovered, and shews all the matter of the Escape, &c. and then it is, (as usually in the Common Bench) *unde queritur qd' cum* he brought a Writ of Debt against *M. W. &c.* and saith not the aforesaid *M. W.* and so it may be a Stranger, and therefore not good, *Cro. Jac.* 188. *Burton and Eyre.* But upon Conference with the Prothonotaries, it is the common course in Actions on the Case after recital of the Writ, in the *unde queritur* to begin *de novo*, and not to say *predicti*, &c. And *Per Curiam*, both courses are well enough.

Course of Declaration C. B.

And

Error in
Fact not
to be af-
signed on
the Escape.

And so it is, tho' there be an Error in Fact. As in the Case of *Jaques*, Car. 2. which was,

On *Non Omittas*, *Capias* and Escape. The *Capias* was of 50 l. and to answer 5 l. *Alano Lockart* Prothonotary: And the Judgment in Debt on the Escape by default is 50 l. and this was assigned for Error; for the Judgment and *Capias* was but of 50 l. as to the Party. But *Non allocatur*, for upon the whole the Judgment is right, and but an Error in Fact, which cannot be assigned on the Escape, 2 Keb. 646. 2 Sanders 98. *Jaques and Keble*.

In Escape against the Marshal, the Plaintiff Declared, That whereas J. S. was indebted to him by Bond, and thereupon arrested by *Lattat*, and put in Bail, and the Plaintiff obtained a Judgment, who thereupon in Discharge of his Bail did render himself to Sir *John Lentball* in Execution, and afterward Sir *John Lentball* (the Marshal) suffered him to Escape. To this it was excepted, that he rendered himself to the Marshal; whereas he ought to say he rendered himself to the Court, for it is the act of the Court that turns him over to the *Marshalsea*; and a Judge can only take and discharge the Bail. But its here, that he rendered himself to Sir *John Lentball* in Court. Which is well enough, *Stiles Rep.* 330. *Child and Sir John Lentball*.

Declara-
tion as the
old and
new Sheriff

As to Declarations upon Escape, after delivery from the old Sheriff to the new Sheriff, and the manner of declaring, I shall cite two Cases, which will much inform us in that point.

The Declaration was, That he was in Execution of the old Sheriff, and delivered to the new Sheriff, and then committed to the Marshal by *Habeas Corpus*, and then suffered to Escape, *Cro. Jac.* 587. *Dowdswell and Sir G. Reynel*.

This

This exception was taken to the Declaration, because it was not shewed, that the ancient Sheriffs delivered him in Execution, with the Causes of Imprisonment to the new Sheriffs; for otherwise, it is an Escape in them, and not in the Marshal, as in *Vestries Case*. For it may be he was delivered *per Indenturam debito modo confectam* for other Causes, and this Cause was not mentioned. And a Declaration ought to be certain to every intent; and tho' it be said *virtute cuius*, he was in Execution under the new Sheriffs, yet that does not help it, for it is but the conclusion of the Premises; and if the matter before does not shew he was in Execution, that *pretextu cuius* will not serve.

In Debt on Escape. The Original and *Capias* which was retornable *Cras. Martin in Michael* —78. was set forth: And that *Sydly in exis' ab Officio* in December, after the Retorn delivered him over to C. and it appears not that the Prisoner was ever in the Custody of *Sydley*. But by *Windham* he could not else be turned over, and it is expressly said he was in Custody, and it may be no Writ was returned by the Sheriff; and tho' in Law he cannot be in Custody till the Retorn, yet that shall be now intended; neither need it be said, that the Sheriff was continued in his Office above a year, *1 Keb. 632. Hargol and Creamer*.

Of Declaring in *Escape* upon Outlawry, there are also two Cases which will greatly direct us: in Declaring

One was Outlawed by the Plaintiff, and by *Habeas corpus* he was delivered to the *Marshalsea*, and escaped. Now the Declaration may be for the party only, and it need not be an Action on the Case *tam quam*, tho' here is a Contempt to the King, *Brigdman's Rep. 8. Moor and Sir George Reynell*.

The

The Office and Duty of Sheriffs, &c.

The Plaintiff in Debt on *Escape* declares of a Recovery of 13, *Outlawed* 15. and that he was taken by *Cap. Utlegat.* 18 *Car.* 2. after the year, and doth not Declare that he was in Custody, nor that he was ever charged in Execution at the Suit of the party, by Prayer on the first Judgment, (in which Case, tho' an Action on the Case will lye, yet not Action of Debt.)

And after Verdict *pro Quer'*, *Maynard* moved in Arrest of Judgment, That this taking after the Year, after the Recovery and Judgment on the Outlawry, does not make the Prisoner in Execution at the Suit of the party, without Prayer; because it may be Intended, that the party intended to have other Execution than the Body. And relied on *Frost's Case* 5 *Rep.* 89. That until election made, he is not in at the Suit of the party, *Siderfin* 380. *Buckland and Kelland*, 2 *Keb.* 408. *mesme Case*.

Tho' the *Capias Utlegat'* be after the year. yet Debt lies upon Escape, without any Prayer of the party entered on Record. Declaration on Escapes in Inferiour Courts.

But upon *Cro. El.* 850. *Shaw and Cutter's Case*, and 706. *Leighton and Garnon's Case*, The Court inclined, that tho' the *Capias* be after the year, yet Debt lies against the Sheriff for the escape, without any Prayer of the party entered on Record; and that he which is taken upon a *Cap. Utlegat.* is in Execution at the Suit of the party, till the party disclaim it, 5 *Rep.* *Frost's Case*.

As to *Leighton*, and *Garnon*, and *Shaw and Cutter's Cases*, *vide supra*.

As to the manner of Declaring on *Escapes* in Inferiour Courts, or upon Removal out of Inferiour Courts, it need not be shewed how the Jurisdiction of the Court was, and how it was held; this being but Inducement to the Action.

And

And so is 1 Cro. *Moys and Hodges*, 2 Kel. 219. *Drinkwater's Case*, the *Escape* being the material part; and tho' its said, the party was Committed *debito modo*, and doth not say, *prout patet per Recordum*, its good enough, the Presidents being both ways.

But in *Hodges's Case* the difference is right. When the Jurisdiction of the Court ought to be set forth, and when not. The Declaration was:

Whereas the Plaintiff in such a Court of *Pyepowders*, held at Gloucester *secundum consuetudinem Civitatis illius*, brought Action of Debt of 200 l. against *Hodges*, and thereupon he was arrested, and under Custody of the Sheriffs of Gloucester, who let him go at Large. *Per Cur.* In pleading a Recovery in Inferiour Court, he ought to shew by what Authority the Court is holden, whether by Patent or Prescription: And this Court being styled a Court of *Pyepowders*, (which is incident to Fairs and Markets, and is for Contracts arising in them) shall not be intended to be a Court, unless it be shewed to be held by Charter or Prescription, and that the Sheriff who is to take advantage thereby ought to shew it. As *Stewards*, when they make any Certificate out of Inferiour Courts, ought to shew therein how the said Courts are holden, for they best know their own Authority. But otherwise in the Case of a Stranger, as here, where the Style of the Court is but an Inducement to his Action, Cro. Car. 58. *Hodges and Moys*.

So Action on *Escape* on Mean Process in Inferiour Courts, by virtue whereof the Defendants as Bayliffs did duly arrest him, and they set not forth any Plaint. And *per Cur.* this is but Inducement, and cured by Appearance, the *Escape* being well set forth, 2 Keb. 209. *Pepper and Some*.

When the Jurisdiction ought to be set forth, and when not.

Need not set forth any Plaint in Inferiour Court.

In

Bayliff of
a Franchife deli-
vered the
person
arrested
to the
Sheriff,
and faith
not at
what place.

In Action on the Case for *Escape*, it was al-
ledged in the Declaration, That the Sheriff di-
rected his Warrant to the Bayliff of a Franchife
to arrest the party; who arrested him, and deli-
vered him to the Under-Sheriff *in eâ parte auborizat*, &c. and shewed no place where the Bayliff
delivered the Prisoner; for it may be it was out
of the County. *Sed non allocatur*: For the shew-
ing the place was but Inducement to the Action,
and when he pleaded Not guilty, the *Escape* is the
Matter material, *Cro. Eliz.* 289. *Appleton and
Burr.*

Its not
alledged,
that the
Sheriff
made War-
rant to
the Bayliff
of a
Liberty.

Debt upon *Escape* was brought against the Bay-
liff of a Liberty, and it was excepted to the De-
claration, that it was not alledged the Sheriff
made a Warrant to the Bayliff on Execution:
But only that at *A.* aforesaid, by virtue of the
Warrant aforesaid, took the Prisoner, and
faith not, within the Liberty aforesaid. *Sed non
allocatur.*

*Profert in
Curia of
the Will.*

Action on the Case on *Escape* brought, and
the Plaintiff declares, That the party was in Ex-
ecution at the Suit of his Testator; its good,
without saying, *profert in Curia* of the Will,
1 Roll. Rep. 78.

*Escape
brought
by Baron
and Feme.*

Baron and *Feme* brought *Escape*; the *Baron*
arrests the Prisoner with a *Latitat* in his own
name sole: And now he declares, That he took
out the *Latitat eâ intentione* to charge the Prisoner,
upon a Bond made to the Wife *dum sola fuit*; and
by Three Justices, its good.

Action on the Case against a Bayliff of a Liber-
ty on an *Escape* by a Clerk of the Hanaper in
Chancery; and declares, that for recovery of
his Debt he prosecuted an Attachment of *Privi-
ledge*, directed to the Sheriff of *Middlesex ad re-
spond* placito *Transf. eâ intentione*, that he should put
in

in Bail for recovery of his Debt on Bond; the Sheriffs of *Middlesex* directed their Warrant to the Bayliffs of *Westminster*, and he arrested him, and suffered him to escape, *Cro. Car.* 329. *Mynn and Hinton.*

The Declaration is naught:

1. Because he does not say of what Liberty he was Bayliff, or whether he hath Execution or Return of Writs.

2. He alledges he had an Attachment of *Privilege* to arrest him in *Trespass*, intending after his Appearance to Declare in *Debt*, which cannot be unless in B.R.

And there the Reason is, because when he appears and puts in Bail, he is supposed to be *in custodia Marescall, &c.* and declares against him in Custody: But it is not so in any other Court.

The Reason of declaring in Debt on *Trespass* in B. R.

Where the Sheriff shall have his Action against the Prisoner that Escapes, and how he shall Declare against him.

Upon a Voluntary *Escape* the Sheriff shall not have an Action on the Case against the Prisoner. *Aliter* upon a Negligent *Escape*, *Mo.* 597.

Sheriffs of N. bring Action on the Case, and Declare:

Whereas *J. S.* recovered against the Defendant in Debt of, &c. and a *Capias ad satisfaciend.* was awarded against him, by force whereof they directed their Warrant to three Serjeants, &c. to arrest him, who did arrest him 26 Febr. &c. and he escaped, and afterwards was not found in the same County, *per quod* by reason of the same *Escape* they were bound to answer the Debt *ad dampnum, &c.*

The Jury, on Not Guilty, found that he was arrested about the 26th of Febr. and to this Declaration it was excepted:

By War-
rant, and
not said
sub sigillo.

1. They alledge they made a Certain War-
rant, and say not *sub sigillo sigillat'*, and a War-
rant without a Seal is insufficient. *Per Cur'*. It is
the usual Form, and they do not say *sub*
sigillo.

2. They say they are chargable with the
Debt; but say not, that they were charged or
damnified, and if they be not damnified, they
have no Cause of Action: For perhaps the
party will never sue them, or they may dye
before suit, and then the Suit is gone.

Sheriff
may have
the Action
before he
is sued.

But *per Cur.* Action lies on this Escape before
they are sued; for the party arrested did a
wrong to them by the Escape and Rescous, and
they are always chargable to the other party;
and if they stay till they are sued, perhaps the
party that escaped may dye, or fly the Coun-
try.

Jury find
the Rescue
circa, &c.

3. The Arrest and Rescue is supposed the
26th of February, which is uncertain whether it
were before or after that Day; and if it were
after the Day, it will not maintain the Decla-
ration, for then it cannot be a Rescue the 26th
Day.

But *per Cur.* the Verdict is good before or
after the Day, so as it was before the Suit com-
menced, *Cro. El. 53. Sheriffs of Norwich versus*
Bradshaw.

If Judgment be given in Debt against the
Sheriff on *Escape*, he shall have an Action on the
Case against the party that escapes, altho' the
Gaoler Licenseth him to escape, and the Gaoler
shall not plead this License, *Mo. p. 404. n. 541. Bel-*
chamber and Savage.

Sheriffs

Sheriffs of *London* brought Action upon the Case against *Paine*, because that he being in Execution under their Custody at *Spicer's* Suit, made *Escape*, &c. The Defendant confessed all the Matter; but further pleaded, That after the Escape, *Spicer* had acknowledged satisfaction (being after the Escape) upon Record of the Sum recovered. Demurrer.

Per Cur', The Action is maintainable, tho' the Plaintiff in the first Action had acknowledged satisfaction, the payment after doth not take away the Action, but mitigates the Damage only: For the act of a Third person shall not take away an Action once vested; 1 *Leon.* 237. n. 321. *Offley and Saltington* versus *Paine*; and *Hills* Case there cited.

Fitzb. N.B. 130. b. its said there, The Plaintiffs in this Action ought to shew, that they had been impleaded by him who recovered; for they cannot have this Action before they are sued.

Qu.

C H A P. XXIII.

Of Pleadings by the Sheriff to Actions brought for Escapes. What shall be said a sufficient Fresh-pursuit, and where upon Fresh-pursuit made he may retake the Prisoner, or not: And where the Prisoner, upon his being retaken, shall have his Audita Querela, or not. Fresh-pursuit, how to be pleaded. Pleading the Statute of Limitations. Pleading acknowledgment of Satisfaction on Record by the Plaintiff, or accord with Satisfaction. Nul tiel Record pleaded, and how. Escape by the Plaintiffs Consent. By the Sheriffs License. Traverses, Superseas, Protection, Priviledge pleaded. Bar by the Voluntary Escape. Venue, Issue, Evidence and Special Verdict. Of Escapes of Felons.

Of Pleadings.

AS for the Pleading to Escapes directly, the Defendant either denies the Escape, and then he pleads *Non permittit ire ad Largum*, or else he confesseth the Escape; but pleads that he made Fresh-pursuit, or that he escaped by License of the Plaintiff.

There are other Pleas common with other Actions, as Statutes of Limitations, Satisfaction, Nul tiel Record, &c. Nil debet.

But I shall first Treat of Pleading Fresh-pursuit: And as to the right understanding of that I shall enquire,

What shall be a sufficient fresh pursuit, or where upon a fresh pursuit of the Sheriff, he may retake the Prisoner or not, and where the Prisoner upon his being retaken shall have his Audita Querela or not.

Tho the Prisoner that Escapes be out of the view, yet if he be taken in *recenti Executione*, he shall be in Execution again; and tho he fly into another County where the Sheriff had not Power, yet for as much as the escape was of his own wrong (whereof he shall not take Advantage) the Sheriff may retake him in another County, and he shall be in Execution. And fresh pursuit is not that he must have him alwaies in his view, but if he makes fresh pursuit, so that it doth not appear fully there was a default in the Sheriff in his pursuit, tho he be a day and a night out of his view, yet he shall be said to be in Execution for the party against his will upon the retaking, as if the Prisoner escape to an House, and the Sheriff sets a Watch and takes him when he comes out.

If the Gaoler make a fresh pursuit before any Action commenced and he is retaken, the Gaoler shall be excused, but ^{if the Sheriff retake him on fresh pursuit before Action brought he shall be excused.} it is otherwise if before the Prisoner be retaken the party brings his Action, for at the time of the Action brought he had good cause of Action; but it seems by *Winch. p. 35.* that retaking upon fresh suit after Action is good, but not after Issue joyned. *Cro. Jac. 657. Whiting and Sr. G. Reynells Case.*

Stow Attorney of C. B. was in Execution in Norfolk for 1000*l.* and he by Practice procured himself to be removed by *Hab. Corp.* before *Coke* Chief Justice at the Assizes in *Lent*, and then el-

caped to *London*, and in Easter Term following the Bayliff did retake him, the Opinion of the Court was, that the fresh Suit made was good, tho he took him again at the end of the year, if inquiry was made after him, and so by consequence Action for false Imprisonment against the Bayliff did not lie. *Mich. 8. Jac. B.C. Stone Case.*

If the Sheriff does not make fresh pursuit, yet he may retake him.

Gaoler makes fresh pursuit, and before he is taken the Prisoner dies yet Action lies against the Gaoler.

In fresh pursuit Sheriff not to break open a Chest.

If the Plaintiff bring his Action before the Sheriff retake him, or if the Sheriff does not make fresh pursuit, yet in both Cases the Sheriff may retake him, and keep his Body in Custody till he agree with him, or he may have Action on the Case for his Tortious escape: And where the Prisoner escapes of his own wrong, and is retaken he shall never have an *Audita Querela* against the Sheriff, but if he escapes with the consent of the Gaoler he cannot retake him, and if he do the party shall have *Audita Querela*: If one in Execution escape, the Sheriff may not retake him but upon fresh pursuit, but he shall have Action on the Case against him, or *Trespass quare prisonam fregit*. 3 Rep. *Ridgways Case*. Poph. 41. *mesme Case*. Jones 145. *Harvey and Reynolds Case*, Cro. Jac. 657. *Whitneys Case*, 2 Rol. Rep. 282, 283, *mesme Case*.

A Prisoner escapes, the Gaoler makes fresh pursuit, and before he hath taken him the Prisoner dies; this is the Act of God, and yet because it was once an escape, the Action of escape lies against the Gaoler. Poph. p. 186.

Upon escape, the Sheriff may not in fresh pursuit enter into the House of *I. D.* and break the Chest of *I. N.* to search for the Prisoner, 2 Rol. Abrieg. 564. *Bennet and Gray*.

If a man in Execution in the County of *Devon*, escapes into the County of *Somerset*, where he is taken in Execution at another mans Suit, and after the Sheriff of *Devon*, on fresh pursuit finds him in Prison in *Somerset-shire*, it is made a Question, how he may charge the Sheriff of *Somerset* with the first Execution, or put the party in Execution seeing he shall not retake him.

1 *Rolls Abrig.* 902.

Tho Information lies against the Sheriff for escape, yet it lies not on escape after taking by fresh pursuit, no more though the Information be depending before the taking, so that the Officers diligence appear. 2 *Keib.* 384. the King against Sir *J. Lensball*,
Information against the Sheriff for escape

Fresh pursuit Pleaded.

The Plaintiff counts of an escape in *London*, and the Defendant Justifies the retaking in *Devon*; so that the escape at *London* is not answered, its naught upon Demurrer; but when the Defendant by his Replication denies not the fresh Suit, but by Protestation relies upon this, that he was out of the view (which is not material, for it is not the form of Pleading to say he had him in his view, &c.) it appears not to the Court that he had cause of Action, now this Bar is sufficient for the matter, but insufficient for the form, and there being no Demurrer, but a Replication, no advantage shall be taken of the Bar for matter of form, 3 *Rep. Ridgways Case, Popham* p. 41.
Place.
mesme case.

Action on the Case for voluntary escape, Defendant Pleads, he escaped in *November* by negligence and Traversed not voluntarily, and that he freshly pursued and took him, and that *postea ante Exhō.*
Traverse. That he died after fresh pursuit, but saith not
videlicet 27 *Aug.* he died, to which the Plaintiff *bille.*

Demurred, because before the escape, and especially for the void Traverse. But *Per. Cur.* the alledging the voluntary escape is immaterial, and the Sheriff chargable without it, and he need not Traverse the voluntary escape, but because he doth not say he died *ante exhibitionem billæ*, Judgment for the Plaintiff, 3 *Keb.* 55. Read and Bovey.

The Plaintiff declared of an escape voluntary, the Defendant shews a negligent escape, its good without a Traverse. *Latch* p. 200. *Harvey* and *Reynell*.

In Debt on escape, Plaintiff declares that the Defendant (Sheriff of *Devon*) suffered one C. who was in Execution to escape in *London*, 18 *December*. Defendant Pleads that the said C. escaped the 16 *December* in *Com' Devon*, and that he freshly pursued him and retook him the 17 *December*, and rekeyned him again in Execution *absq; hoc*, that he is guilty *aliter vel alio modo*. On this it is Demurred; because the escape is supposed to be the 18 *December*, and he Pleads the escape 16 *December*, and the retaking the 17 *December*, and so he answers not to the escape mentioned in the Declaration, for the Traverse *aliter vel alio modo* doth not answer to the Time, but to the manner of any thing alledged, and *Per Cur.* the Plea is ill. *Cro. Eliz.* 439. *Ridgways* Case.

Defendant must answer to the Escape mentioned in the Declaration as to time, &c. Traverse *aliter vel alio modo*. On *nil debet* in Escape which may be given in Evidence.

On *nil debet* Pleaded in escape, fresh pursuit may be given in Evidence; so a release or any thing that destroys the Duty. *Vid. supra Tit.* Evidence. 3 *Keb.* 308 *Lutterel* and *Mosedell*.

Now as to other Pleas, and the formality of pleading, what shall be good or not, the Cases following are of great consideration to instruct us in that useful Learning.

Debt for an escape is not within the Stat. of Statute of Limitations, tho' Action on the Case is; the words of the Statute are, *All Actions of Debt grounded on any Lending or Contract, without specialty, shall be brought within six years, 1 Siderf. 205, 206. 1 Sand. 38.*

Now first, This Action is not founded on any Lending or Contract; here is a Duty created by the Law without Lending or Contract, 2 Inst. 388.

2. This Action is founded on a Specialty, (*viz.*) on a Statute Law; for at Common Law no Debt on Escape lay against a Gaoler, &c. of one out of Execution, and the Statute of 1 R. 2. c. 12. gives the Action of Debt against the Warden of the Fleet; and this Statute by Construction, extends to all other Gaolers and Sheriffs, 1 Sand. 37, 38. *Jones and Pope.*

Acknowledgment of Satisfaction on Record is a good Plea. Acknow-
ledgment
of Satis-
faction on
Record.

The Sheriff brought an Action on the Case against J. for making his escape out of Execution. Defendant pleads, Confessing all the Matter, and that after this Escape he at whose Suit he was condemned, had acknowledged satisfaction on Record. To which it was demurred. *Per Cur.* The Plea is good, because the Defendant is to be charged; for that the Plaintiffs are chargeable with the Debt, and not otherwise; and the Defendant hath pleaded Satisfaction acknowledged on Record, which may by his means, and is not denied; for otherwise the Plaintiff might have shewed the Special Matter by Replication, *Cro. Eliz. 237. Salteston and Payne.*

Accord

Accord
with satisf-
faction.

Accord with satisfaction, is no Plea. In *Scire fac.* on Judgment in Escape, on *Oyer*, the Defendant pleads *Executio non*; because that after the Judgment the Defendant assigned the Obligation of Security of *T.* the party who escaped, which the Plaintiff received and accepted. To which the Plaintiff Demurred. And *per Cur.* Accord with Satisfaction is not pleadable after a Judgment, 3 *Keb.* 255. *Poole and Mosedell.*

Nul tiel
Record.

Nul tiel Record is a good Plea.

Debt on Escape against the Sheriff upon a *Capias Utlagat'* after Judgment: Defendant pleads there was no such Record of the Debt and Damages. It is a good Plea on Demurrer, 1 *Brownl.* 51. *Maddox and Young*, *Hob.* pag. 209.

Command
of the
Plaintiff.

In Debt on Escape one may plead, That the Plaintiff commanded him to let him out of Execution, *Cro. Car.* 329. in *Vesey's Case.*

Escape by
consent of
the Plain-
tiff pleaded

In *Scire fac.* on a Recognizance, as Bail in a Writ of Error in the *Exchequer Chamber.* The Defendant pleads, That the Plaintiff sued a *Capias ad satisfaciendum* out of the Kings-Bench to the Sheriff of *Middlesex*, and he was taken in Execution thereon, and suffered to escape by the Plaintiff's consent. The Plaintiff demurs, because they do not lay a place where the Court was held, nor where the party escaped by Consent, 2 *Keb.* 567. *Mod. Rep.* 19. *Prinn and Smith.*

Payment of the Money to the Marshal is no Bar; but payment to the Sheriff on a *Fieri fac.* is good; for he is commanded to levy the Money, &c. but no such Authority is given to the Sheriff, *Sir Tho. Jones* p. 97. *Taylor and Baker.*

In Escape the Defendant pleads a Release of him who recovered, to the Prisoner, being in Execution; its holden no Plea. *Nil debet* in Debt on Escape, 19 H.6.14.

As to Traversing, and Forms of Pleading.

In Trespass and Imprisonment the Defendant Justifies by virtue of a *Capias*, and the Plaintiff did afterwards escape, and he being Sheriff did follow him by virtue of the said Warrant, and took him upon the *Capias*. The Plaintiff replied, He escaped by License of the Sheriff, and Traverseth the latter taking by virtue of the Warrant. *Per Cur.* The Traverse is idle, because the Plaintiff had sufficiently confessed and avoided; and if he escaped by the Sheriffs License, that ought to be the thing put in Issue, and not the Traverse, 1 *Brownl.* 197. *Hatton and Hunn.*

Action on the Case upon Escape was brought against a Serjeant of *London*. He pleads that the Sheriff commanded him to deliver his Prisoner to him; which he did, and Traversed, that he was guilty of the Escape, *Aliter vel alio modo*. *Per Cur.* The Serjeant is an Officer of the Sheriff, and the usual manner of Pleading is to plead, That the Prisoner was in custody of the Sheriff; and Sheriffs in *London* may make their Houses their Prisons, as well as the Counters, and the Bar was good, but the Traverse was ill, *Siderfin* p. 318. *Husband and Cole*, 2 *Keb.* 147. *mesme Case.*

This Plea is a Confession and avoidance, and the Traverse is ill. But *per Cur.* here is no Escape confessed; and therefore *Not guilty* should have been pleaded, and not to take a Traverse.

That he escaped by the Sheriffs License, is good without a Traverse.

Traverse, That he is guilty of the Escape. *Vid. sup.*

Not guilty.

Debt

Debt against the Sheriffs of London upon Escape of A. The Plaintiff Declared on an Execution by force of the Recovery, and that the party was in the Prison of Ludgate, *sub custodia* J. S. & J. D. then Sheriffs, 1 H. 8. and that he so continued *sub custodia* J. B. & J. G. 2 H. 8. and so continued *sub custodia* J. N. & J. L. 3 H. 8. and then was suffered to escape. J. N. and J. L. pleaded, That before the Escape at such a Day, *Anno superius in Narratione specificato*, the said J. D. and J. S. *ad tunc Vicecomites* suffered him to Escape.

Plea to be
precise as
to time.

Per Cur. It is no Plea, because there was three years specified in the Declaration, and it shall be taken that it was the first or third of H. 8. when they were out of their Office, yet it is merely induced by the *ad tunc Vicecomites*, which shall lead the Intendment to be in the year in which the Defendant supposeth they were Sheriffs.

But *per Cur.* that sufficeth not, but the Plea must be alledged in Fact; and therefore the Defendants meaning, to discharge themselves by former Escape, which was not in their time, should alledge it precisely, *Dyer 66. Serjeant Minor's Case.*

In Debt for an Escape of one in Execution. Defendant pleads *Nil debet*; and after Issue, and the Cause entred for Trial, the Defendant would acknowledge the Action with *relicta verificatione*. But *per Cur.* this he may not do without the assent of the Plaintiff; for many defects are aided by Verdict, *Sir Tho. Jones Rep. 156. Marshall and Cooling's Case.*

The Plaintiff chargeth the Defendant with an Escape, 13 Ap. 18. Jac. and the Defendant pleades Escape, 29th Feb. 16 Jac. which was a year and two days before the Escape alledged by the Plaintiff; to which the Defendant made no answer, and altho' he concluded it was the same Escape which makes the Plea good where the time is not material, yet in the principal Case the time seems to be material; for the Defendant, (the Marshal) Pleads, that the Prisoner was committed to him by *Habeas Corpus*, and that he remained in his Custody from such a time till such a time, during all which time the Plaintiff never prayed to have the said Prisoner in Execution, *Bridgmans Rep. p. 7. Moor. vers. Sir G. Reynel.*

In an Escape, The Defendant confessed that H. was in his Custody by *Latit* retournable *Mercurij Craft. Animarum*, but said that a *Superse-deas* came to him (which varied from it) reciting a Writ Retournable *die Veneris Crastino Animarum*, for which variance the Plaintiff Demurred as being not the same Action, which the Court agreed, 1 Keb. 234. *Earl of Bedford against Austin.*

In Action on Escape, in Debt on Judgment Defendant Pleads, That after he was arrested he was discharged by Protection shewed to the Bayliff, as Servant to the Earl of Bath. *Per Cur'* the Plea is naught, 1 Keb. 660. *Cockman and Symonds.*

In Action on the Case on Mean Process Sheriff Pleads, That a Writ of Priviledge came to him *Teste* Marquess of Newcastle Retournable at Sessions: Which recites, that by the Law of England, persons shall be priviledged in going to and returning from the Sessions. To which the Plaintiff Demurrs, and the Court held the Plea.

Plea to be ill; yet the Court were in doubt upon a second motion, whether the Priviledge shall extend to such inferior Courts. Also it is ill pleaded, not shewing where the Writ issued, nor where the Sessions was, nor whether the Discharge were in Session, *Siderfin* p. 269. *Clark and Mollinux*, 3 *Keb.* 845. *Mesme* Case.

The advantage of pleading the Statute 23 H. 6. lost by Demurrer.

In Action on Case for Escape and false Return, if the Sheriff Demurs generally upon the Declaration, he loseth the advantage of Pleading; Stat. 23 H. 6. c. 10. *vide supra*. *Benson and Welby*.

Venire.

In Action of Escape, *Venire* shall not be charged, nor in Debt: For these may be all over England, 1 *Keb.* 65. *Wright and Martin*, *Stiles* Rep. 341.

By the Marshals Priviledge, the Jury on Escape were changed out of London into *Middlesex*, 2 *Keb.* 818. *Crook. and Mosedale*.

Hale said, he knew him after Impar lance ousted of this Plea; but here the Court would not put him to Plead it, but granted a Tryal in *Middlesex*, and Escape in *London*, being so every where, *Cro. El.* 625.

Venire is most proper to be from the place where the Escape was.

Action is brought against the Defendant as Sheriff for the Escape of R. in *Norfolk*, and falsely retorning *non est inventus* in B. R. the false Return is not the principal, but the Escape is the cause of Action; and the false Return which is also made in *Norfolk* is but Aggravation, the Party may lay it in either County, 2 *Keb.* 771. *Russel and Sucklin*.

Where

Where the *Venire* and Return differ its not good, *Hetly. 83.*

Per Cur. No Cost shall be on Non-suit in this Action, by the Stat. 32 H. 8.

Of Escape being pleading in Bar.

It has been adjudged as well on *Scire fac.* as in Debt, that to plead he was in Execution, and *contra voluntatem* of the Sheriff escaped, is no Plea. No tho' it were by permission, *vid. 2 Keb. 305. Ridly and Morslee, Cro. Car. 24. Robinson and Clapton, Vilner's Case, Allenson and Butler, Symonds and Cottmar.*

To a *Scire fac'* on Recognizance as Bail in ^{Escape by} Error, Defendant Pleads, that the Plaintiff after consent. Judgment sued a *Capias ad satisfaciend'* out of the Kings Bench, and that the Defendant was thereupon taken, and that he escaped by consent of the Plaintiff. *Per Cur'*, The Plea is ill for want of Place, it is not said where the Court was held, nor whether the Party escaped by consent, *2 Keb. 567. Moor. Rep. 19. Prin and Smith.*

To *Scire fac'* on Judgment in Debt, Defen- Bar by vo-
dant pleads a *Capias ad satisfaciend'* issued out of ^{luntarily}
the Court of Kings Bench, and that he was taken ^{Escape ill}
thereupon, and on *Habeas Corpus* out of the Com- ^{as to party}
mon Bench, he was committed to the Custody ^{Plaintiff.}
of the Warden of the Fleet, and that the Warden suffered him voluntarily to Escape. To this it was demurred, because he concludes not aright: And *per Cur'*, the Execution must be alledged by matter of Record, and therefore he must conclude his Plea, *prout patet per Recordum*: The difference is between Process that requires no Return, and the Record whereby he

he is committed is shewed. The *Committitur* in an Action of Escape is but inducement, but in a justification it is substance. Upon a *Capias* or *Latitat* he need not so conclude, but here is Matter of Record also, here the Matter of the Bar is not the Matter of Fact, but the having sued out Execution on Record. And Secondly, Its all one as to the Party, whether he Escape by the Sheriffs negligence or voluntarily. If the Party negligently Escape, the Party and the Sheriff may take him again, but if voluntarily, then only the Party may take him again, but not the Sheriff; but if the Sheriff let him go by consent of the Plaintiff, then neither can take him; and Bar by voluntary Escape is held Ill. Judgment *pro Quer*, 2 *Keb.* p. 187, 206. *Alenfon and Butler*, 2 *Keb.* 802. *Vilner and Allen*.

Until of late time the Discharge of the Gaoler was a good Discharge. As in 3 *Co. Ridgeways Case*, *Hob. Case of the Earl of Essex*, 8 *Rep. Dr. Drury's Case*, but now the Law is taken otherwise. *Vide supra*.

In *Audita Querela*, voluntary Escape in the Sheriff is no good surmise, but that the Sheriff may retake him again. *Vide supra*. 1 *Roll. Ab.* 902. *Trevillian's Case*, *Hob.* 202. *Sheriff of Essex*.

Escape.

Of Issue, Evidence, Special Verdict,

On *nil debet*, Fresh
pursuit.

In Debt for Escape on *nil debet* pleaded, the Defendant may give Fresh pursuit in Evidence. And by *Hales*, at a Tryal at Bar said, he always let them give in Evidence Fresh pursuit on *nil debet*. And by *Wild*, it is done generally, *Mod. Rep.* 116. 3 *Keb.* 305. *Mosedell's Case*.

In

In Action against a Gaoler upon Escape of a Prisoner in Execution: If the Issue be, whether the Gaoler immediately after the Escape made Fresh suit after the Prisoner, &c. and the Evidence is given, that a Prisoner escaped out of Prison by the negligence of the Keeper, and is absent a day and a night, and the Keeper knows it not (having many other Prisoners under his care) but when he had notice of it, he immediately makes Fresh suit after him, and retook him: This is an immediate Fresh suit to maintain the Issue, for convenient perſuit is an immediate perſuit in Law, 2 Rol. Ab. 681. *Hinion and Sir John Lenthal, and Elton and Sir John Lenthal*, on Evidence at the Bar, where the Evidence was that he escaped at nine a clock at night, and the Notice and Fresh Suit on which he was retaken, was the next Morning at nine a Clock.

Which is
a Fresh
perſuit.

Issue was, whether *A.* was taken by a *Capias* at the Suit of *B.* and Evidence was taking by a *Capias* at the Suit of *C.* and then a Delivery of a *Capias* at the Suit of *B.* to the Sheriff, its good Evidence; for tho' he were taken before, yet this is a new taking in Law as to this Execution. So if the Issue be of a taking on a *Capias ad satisfaciend'*, and Evidence be by a taking on a *Capias Utilegat'*, or *pro fine* with a prayer of the Plaintiff, that he may remain for satisfaction.

Issue was, whether *J. S.* was taken with a *Capias*. Evidence was given by an *alias Capias*. And good, *Hob. p. 54.*

In Debt on Escape against the Marshal, and *Nil debet* pleaded. The Plaintiff said, he could prove that the Prisoner was at London three long Vacations. The Evidence was an *Habeas Corpus ad Testificand'* and that the Prisoner went down too long before-hand, and stayed too

Evidence
by *alias*
Capias.
Evidence
of Fresh
perſuit.

A a

long

The Office and Duty of Sheriffs, &c.

long after the Assizes were done at *Wells*, and that he went 60 Miles beyond *Wells* before he returned again. *Verdict pro Quer.* for 620 l. *Mod. Rep.* 116. *Mosedell's Case*.

Ne unques en son gard
how tried.
The Prifal
how tried
on *Cap.*
not Retor-
ned.

Imprison-
ment on
the Execu-
tion how
to be tried.
How in
the Case
of Mayor
of the Sta-
ple.

Arrest in
one County
and Escape
in another
where to
be tried.

In Escape upon a *Capias* returned, *ne unques en son gard* shall be tryed by Record: But upon a *Capias* not Returned, the prifal shall be tryed *per Pais*, *Rolls 2 Abr.* 574.

The Imprisonment upon the Execution, and not for other cause in Escape shall be tried by the Record. But in Escape against the Mayor of a Staple, for suffering *J. S.* in Execution upon a Statute Staple to go at large, if the Defendant say he was not in Prison upon the Execution, but upon plaint there, this shall be tryed *per Pais*, and not by Record; because it would be unreasonable, the Defendant should certifie a Record where he himself was concerned.

In Escape upon Arrest in one County, and Escape in another County; upon not Guilty this shall be tryed, where the Escape is laid, for the Action is upon the Escape, *Roll. Ab.* 602.

Action on the Case against a Sheriff upon Escape in *London*, and the Arrest laid to be in *Southampton*. *Per Cur.* The *Visne* shall be where the Escape was, because that is the ground of the Action, and not where the Arrest was, 3 *Cro. Richbel and Goddard*.

Note, In Action on the Case for Escape or Deceit the Court will not charge the *Visne* out of the County where the Plaintiff supposeth the thing to be done, *Siderfin p.* 87.

Charging
the *Visne*.

In Action on the Case against the Sheriff of *York* for an Escape, and declares that he arrested the Prisoner in the said County, and after suffered him to escape at *D.* in *Com' Nottingham*.

To

To which the Defendant pleads not Guilty, this Issue may be tryed by the County of Nottingham only, without joyning the County of York; for the Action and Issue is upon the Escape and not upon the Arrest, *M. 40 & 41. El. B.R. Bennion and Watson.*

Debt against the Marshal for suffering T. B. in Execution at the Plaintiffs Suit to Escape. Defendant Pleads, he did not suffer him to Escape. And gave in Evidence, That T. B. brought Evidence Attaint to Reverse the Judgment, and upon his Prayer the Court bailed him, that he might prosecute the Suit with effect. But this Bail was not entred of Record. And the Court held it good Evidence. The Escape supposed here is for letting him go by Bail, which is the act of the Court and not of the Marshal, and may well be given in Evidence, *Cro. El. p. 5. Vast and Gandy.*

By Wray, upon Execution sued after Verdict, altho' the Party Sues Attaint, the Court usually does not Bail him, for the Verdict is intended true till reversed, but on good Considerations they may: And tho' the Bail be not entred, yet the Plaintiff for his benefit may cause it to be entred, and then he may have a *Scire fac'* on the Bail, and so is not at any mischief.

The Party being charged in Mean Process when he was in Custody, the Evidence may be good without proving any *Comittitur*; but if he were in Execution the *Comittitur* upon the Roll shall be proved, *Siderfin 237. the King and Powey.*

In Debt *sur Escape*, if the Defendant Plead No Escape, he cannot plead in Evidence no Arrest, *Tryal per Pais 174. Clayt. 34.*

be proved in Evidence on Escape for Mean Process.

Verdict.

Escape
against two
and found
against one
only.

On the
Escape of
Baron and
Feme, the
Jury find
the Baron
only in
Execution.

Verdict
finds an
Erroneous
Process.

Verdict on
Rescous
before the
day laid, or
after.

In Debt on Escape if the Plaintiff Declare of an Escape of two, and its found one only was in Execution; yet the Verdict is good, and the Plaintiff shall have Judgment, *Siderfin p. 5. Andrews's Case.*

In Debt on Escape, if the Plaintiff Declare of the Escape of Baron and Feme out of Execution on Judgment for the Debt of the Wife *dum sola*, and the Jury find the Husband only was in Execution; yet the Verdict is good, and the Plaintiff shall have Judgment. The Jury found not that the Wife was taken in Execution (being for Debt contracted before Coverture,) *Siderfin p. 5. Roberts and Herbert. 1 Keb. 371. Mesme Case.*

Though the Verdict find an Erroneous Process, yet the Sheriff shall not take advantage thereof. As in Debt on Escape, and special Verdict finds an *alias* into another County, without a *Capias* in the proper County, and that I was in Execution and escaped. Judgment *pro Quer.* on 2 Cro. 1. Pl. 1. & Co. Dr. Druries's Case, because the Sheriff is a Stranger and shall have no advantage thereof, 3 Keb. 629. *Hide and Hillar.*

One rescued himself and escaped, and the Sheriff brought Action on the Case. On not Guilty, The Jury found he was arrested *circa* the 26 of Feb. and then and there rescued himself. *Per Cur'* be the Rescous before or after the day supposed in the Declaration its good enough, so as it be before the Suit commenced, Cro. El. 53. *Sheriff of Norwich and Bradshaw.*

Consideration on Assumpsit, about delivery of Prisoners in safe Custody, and saving harmless of Escapes.

The Sheriff having one in Custody takes *Assumpsit* of *J. S.* to deliver the Prisoner to the Bayliff in safe Custody, this is a good *Assumpsit*, and no Escape. For the Court will not intend, that the Bayliff was absent from the Prisoner, *Siderfin* p. 132. *Benskin and French*.

In consideration the Plaintiff (who sueth as Bayliff) would permit *J. S.* taken in Execution to Rest in the House of *N.* till Friday next, if he Escape the Defendant would pay the Debt:

By *Hales*, The Consideration is good in Mean Process, but being in Execution its ill. But the Action must be brought by the Bayliff or nobody; but consideration to make a Special Bayliff is sufficient to save harmless. This is no Bond or Promise taken of the Prisoner, nor of any for him, therefore 'tis not within the Statute, 2 *Keb.* 805. *Feake and Carter*, 1 *Leon* p. 132. *Palmer and Smalbrook*.

The Bayliff assumes to save the Sheriff harmless of all Escapes is not good. The Declaration is, That a *Ca. sa.* on a Judgment was awarded against the Defendant to the Sheriff of *Suff.* who directed his Warrant to the Plaintiff as his Bayliff to serve it; and that the Plaintiff assumed to the Sheriff to save him harmless of all Escapes, and that by force of the Warrant he arrested the Defendant, and the Defendant intending to make the Plaintiff to be charged, escaped; for which the Plaintiff in the first Action brought an Action against *J. C.* the Sheriff, upon this Escape, and recovered, and *J. C.* brought

this Action on the *Assumpsit*. It was moved in Arrest of Judgment, that there is no sufficient Cause in the Declaration to maintain an Action, for tho' the Sheriff may have Action on the Case against the Prisoner that Escapes, yet the Bayliff shall not have it. *Per Cur'*. For the Bayliff was not chargeable to the Sheriff by Law but by *Assumpsit*, and this being his voluntary Act shall be no cause to charge the Defendant, but shall only make himself chargeable. But they agreed, If the Bayliff had been chargeable by Law, without such Promise, Action lay for him against the Defendant, who caused him to be charged, *Cro. El. 349. Allerton and Harwood.*

In Consideration he would permit him to go at Large, and of 2 s. paid he promised to pay all the Money in which the Party was condemned in Execution. *Per Cur'* the Consideration is not good, being contrary to the Statute of 23 H. 6. and that a Promise and Obligation was all one, and tho' it be joyned with another Consideration of 2 s. yet being void, and against the Statute for part, it is void in all, *Cro. El. p. 199. Tetherstons's Case. Pl. Dive and Manningham.*

Plaintiff declared, Whereas the Defendant was arrested at his Suit on Process, the Defendant in Consideration that he should be permitted to go at Large, promised that he would appear at the day of the Return of the Prisoner, or would give him 10 l. and he did not appear at the day. *Per Cur'* Its a good *Assumpsit*, being made to the Party which had Authority to dispense with his appearance: Had it been made to the Sheriff, or to any other to his use, it had been within the equity of the Statute of 23 H. 6. *Cro. El. 190. Millward and Clarke.*

Of Escapes of Felons.

All Prisoners are such, either by Matter of Record, or Matter in Fact.

By Matter of Record, when one present in Court is committed to Prison by the Court. There if the Gaoler has not him ready, its an Escape without more enquiry, (unless he had reasonable excuse) and the Judges will set the Fine presently.

By Matter *en fait*, a Man is a Prisoner when he is arrested by Sheriff, Bayliff, Constable, &c. and Escapes, there the Jury ought to find it, and present it before the Justices, and the Justices assess the Fine.

Upon a *Capias* for Felony, the Sheriff Returns *Cepi Corpus*, and hath not the Body at the day, and the Sheriff was amerced for the Escape at 50 l.

By some it is Felony in the Sheriff to suffer a Prisoner to Escape. *vid. Stat. de frang. Prisonam*. If the Gaoler suffer the Escape, its Felony in him, and forfeiture of the Office, 6 H.7.11. 10 H.7, 26. 9. Rep.98. Co. on M.Charta. Keil.195, 196. *vid. Dals. 567.*

The Statute of 4 Ed.1. *de frangensibus Prisonam* mitigates the Rigor of the Common Law; for before that Statute, the breaking of the Prison was Felony in every Case, but now it is not Felony, but where the Party was committed to Prison for Felony, 2 Leon. p. 161. in *Borough and Holcrofts Case*.

C H A P. XXIV.

What act of the Sheriffs, Bayliffs, &c. shall amount to False Imprisonment, or not. Pleading by Sheriffs to Actions of Trespafs, False Imprisonment, &c. The Rules of Pleading in such cases. Justification by Mean Process. As to the Warrant, Time, Place, Quæ est eadem transgressio, what it refers to. Traverse of the Time, Place, Pleadings and Justification by Execution; by Process out of an Inferiour Court of Record, and how to be pleaded.

What acts of the Sheriffs, Bayliffs, &c. shall amount to a False Imprisonment, or not.

Arrest
after the
Writ
Retained.

IF a Bayliff arrest one after the Writ is Returned, False Imprisonment lies.

Precept
from an
Illegal
Court.

A Precept to arrest from an illegal Court will not save the Officer from an Action of False Imprisonment, Hob. p. 61.

Erroneous
Process.

Trespafs, &c. will not lye against the Sheriff, for executing Process, tho' it were erroneous, Hob. p. 48. Cox and Barnsly.

Arrest by
a wrong
Name.

One asks another if his Name be J. S. who said, Yes; on which he arrests him by a Warrant which he had to arrest J. S. yet False Imprisonment lies, Mo. 457. Coot and Highworth.

Arrest after
Superseas

One had a *Capias ad satisfaciend'* delivered to the Sheriff, who made a Warrant to his Bayliff to do Execution: Afterwards a *Superseas*

was

was awarded and delivered by the Sheriff, the Defendant being his Bayliff, who escaped, and the Defendant retook him and detained him in Execution: This second is False Imprisonment; for tho' the first Imprisonment was legal, he having taken him by virtue of a Warrant made before the *Supersedeas* awarded and delivered, he not having notice of *Supersedeas* was excusable. But the detainment in Prison was afterwards a Wrong. For he being the Sheriffs Servant, and by Intendment having time given him sufficient to have Notice from his Master, ought at his peril to take notice thereof, *Cro.El.918.Prince and Allington.*

The Liberty of a man is so tender in the eye of the Law, that a small thing amounts to False Imprisonment. As in a Case tryed at *York Affizes*, one *Roberts's* Case.

One in Execution in the County of *Lancaster*, One in desired to be brought to the County of *York*, to speak to his Friends; and being there endeavoured to make his escape; and the Defendant commanded to stay him: He was held a principal Imprisoner, as well as those that laid hands on him. The Defendant pleaded *Not guilty*. Otherwise had it been had he pleaded specially, (*viz.*) That the Prisoner was brought into another County at his own desire. But the Jury honestly gave but 2*d* damage, *Roberts's* Case at *York Affizes*.

If a man be in the hands of the Under-sheriff in Execution for Debt, and the Debtee tells the Sheriff, that the Prisoner has satisfied him, if the Sheriff release not the Prisoner, its False Imprisonment to detain one after the Plaintiff hath commanded the Sheriff to deliver him. But this Case is more fully reported in

Bulstr.

Bulstr. 3. 96, 97. *Witbers* versus *Henly Under-sheriff*.

Plaintiff
tells the
Sheriff he
had made
a Release.

A. is in Execution at the Suit of *B.* afterwards *B.* came to the Sheriff, and told him he had made and sealed a Release of the Debt to the Plaintiff, and that therefore he should deliver him out of Execution. The Sheriff doth not so, but after keeps him still in Prison. The Plaintiff brings Action of False Imprisonment. It lies.

By the *Stat. 1 R. 2. c. 12.* One being in Execution shall not be suffered to go out of Prison by Mainprise, Bail or Baston, without making gree to the parties, unless it be by Writ or other Commandment of the King; and the detaining him after this amounts in Law to a New taking. For the restraining of his Liberty where he ought to have it, is a Caption in Law. Here the Sheriff ought to take notice of the party Plaintiff, and at whole Suit he is in Custody.

By *Coke*, Detainer after this by the space of one Hour is False Imprisonment, (a Continuance of an Inclosure is a new Nuisance.) If he would have helped himself here, he ought to have set forth that he knew him not to be the Plaintiff, who told him of the Release, *3 Bulstr.* 96, 97. *Witbers* versus *Henly Under-sheriff*. The Case of *20 H. 7. 19.* differs from this Case, because the Debt, of the King was satisfied, *15 H. 6. 3. a. 1 Roll. 240. mesme Case, Cro. El. 379. mesme Case.*

It is said in *2 Keb. 33.* the party who went with the Sheriff to shew to him where the Goods were (in Execution) the Judgment being set aside afterwards, was a Trespassor *ab initio*; but that the Sheriff was not suable nor chargable, *2 Keb. 33. Turner and Felgate.*

It was agreed in *Olliet and Bessey's Case*, Where
 34 Car. 2. B.R. if one be arrested by Process out of an Inferiour Court for a Cause of Action, which does not arise within their Jurisdiction; the party Plaintiff may well maintain his Action against him that levied the Plaint, or the Officer who had executed it, *Sir Tho. Jones Rep. p. 214* *Olliet and Bessey*.
 A ction to be brought against him that levied a Plaint wrongfully, not against the Officer.

Pleadings by the Sheriff, Bayliffs, Gaolers, &c.

I shall lay down two or three general Rules
 If a Sheriff justifie by force of a *Capias* to him directed, he shall say he was Sheriff at the time of the arrest, as well as at the receipt of the Writ, 35 H. 6. 48, 49.

If the Bayliff justifie by force of a Warrant, he ought to shew the place where the Warrant was made, 5 H. 7. 24. Long 5. 101. b.

In Trespass, where one justifies as an Officer to do Execution, *De son tort demesne* without answering to the Cause is no Plea, 19 H. 6. 7. a.

In False Imprisonment the Defendant may shew twenty Causes by way of Justification, and it is not double, 7 Ed. 4. 20. *Plowd. Comment.* 86. a.

Where the Sheriff justifies by Execution, he must plead that he returned the Writ, *secus* of a Bayliff, 1 Leon. p. 144. *Parkes and Mossé*.
 Return of the Writ.

If a Bayliff justifie by force of a Warrant, he need not say *hic in Cur' prolat'*; for the Warrant doth not continue in his hands; but he returns it to the Sheriff, 1 Roll. Rep. 327. *Curtis and Dowty*, & p. 221. *Bateman's Case*.

Tho'

On Irregular
proceedings in a
Court.
Warrant.

Tho' the Proceedings in a Court be irregular, yet if the Court has power to issue out a *Capias*, by this Warrant the Officer may justify in False Imprisonment, *Mod. Rep.* 173.

If a Bayliff justify by reason of a Warrant, he ought to shew the place where the Warrant was made. It sufficeth if it be shewed in the Rejoynder, 5 *H.7.* 24.

Justification by Mean Process.

The immediate
Officer
must shew
the Process
Retorned.

The Sheriff ought to Return his Writ, otherwise Justification is not good: But it is not so with the Servant.

False Imprisonment was brought against the Sheriffs Bayliff; he Justifies by the Sheriffs Warrant on *Latitat*, who arrested the Plaintiff, and required the Defendant to be aiding to him; but pleads not, That the Writ being Retorned was executed. Yet *per Cur.* its good; for the — has no means to reinforce the Sheriff to make Return thereof, *Cro. Car.* 446. *Girling's Case*.

In Action of False Imprisonment, the Defendant Justified by Process to the Bayliff out of the Court of the Honour of P. and does not shew any Process was Retorned, which (as *Girling's Case* is) being an immediate Officer, must be shewed; *contra* of an Under-Officer. And altho' he need not shew forth the Letters Patents, yet it must be specially pleaded such a Court was granted, and that *virtute*, &c. 2 *Keb.* 156. *Haywood and Wood*.

If the Defendant in Justification of an Arrest pleads, That a Bill of *Middlesex* was prosecuted against the Plaintiff, by which the Sheriff made
and

&c.

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Capias,
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Officer.
Letters
such a
2 *Keb.*

Arrest
ented
made
and

Chap. 24. Of Justifications by Sheriff, &c. 365

and directed a Warrant to arrest him; it shall be intended that the Bill was delivered to the Sheriff before the making of the Warrant, till it be specially shewed to the contrary. In this case he Justifies by Writ to the Sheriff, and Warrant to himself, 1 *Sand. 299. Green and Jones.*

Bill of
Middlesex
intended
to be deli-
vered to
the Sheriff
before the
Arrest.

The Causes of Demurrer were, because its not shewed the Writ was delivered to the Sheriff, nor the Warrant made before the Arrest; and also for that its not averred that the Writ was Retorned. But *non allocantur*, this is no essential Matter, nor Traversable: And the Plaintiff might have Replied, That the Arrest was before the delivery of the Writ, else the Court will intend it to be delivered, being said that *Virtute* of a Writ directed to the Sheriff and warrant the Defendant arrested; and the Writ needs not to be Retorned by a Bayliff-Errant, 2 *Keb. 338. mesne Case, & p. 838. 844.*

So in *Scire fac.* on Recovery in Action on the Case, the Defendant pleads no *Capias* issued out against *H.* delivered to the Sheriff. Plaintiff Replies a *Capias* issued out, and *Non est inventus* Retorned; but says nothing of the delivery to the Sheriff. Defendant Demurs, and Judgment *pro Quer.*; for the Delivery to the Sheriff shall be intended, 3 *Keb. 668. Holmes and Araker*, Bail for *H.*

The Time when a *Latitat* issued forth is Traversable, and may be averred otherwise than according to the *Teste*, *Per totam Curiam*; for a Relation shall not work a Wrong, 2 *Keb. 173, 198. Belton and Johnson.*

As to the
Time of
the taking
out the
Writ
actually,
and the
Teste of it.

If a man be taken in the Vacation by a Warrant without a Writ, and a *Latitat* be procured, *Teste* in the Term, that *Teste* shall not discharge the

the Wrong done after the *Teste*, and before the actual taking out of the Writ; but the Plaintiff may take Issue that he prosecuted truly. But in Trespass and False Imprisonment, the Defendant as Sheriffs-Bayliff Justified by a *Latitat*, *Teste 27 June, Trin.* Term past.

The Plaintiff Replies, That the said Writ was really and actually prosecuted out of B.R. on the 9th of *August*, which was after the Arrest of the Plaintiff.

Defendant Demurs: And *per Cur.* this is an Estoppel, especially in case of a Bayliff, whose Warrant might be before the Arrest; and all Writs must be *Teste* as of the Term, and the Sheriffs not Retorning the Writ, or the not having any, shall not prejudice his Under-Bayliff.

But *per Cur.* a good Action will lye against the Sheriff or Bayliff of a Franchise in this Case.

But in *Plunket and Green's Case*, in the same Reporter:

In Trespass and False Imprisonment against the Sheriff and Bayliff, the Defendant Justified by Warrant on Writ to the Sheriff, as *Long and Bolton's Case*. The Plaintiff Replies, No Writ was then taken out. Defendant demurs, and Judgment *pro Quer'*; for tho' the Bayliff hath a Warrant, yet he is liable if there be no Writ; *contra*, if the Writ be void and delivered, 2 *Keb.* 705. *Plunket and Green*.

Warrant
and no
Writ.

And in *Bennet and Filkin's Case*, *Trespass and False Imprisonment*, the Defendant Justifies by arrest on *Latitat*. Plaintiff Replies, The Writ was taken out after the Arrest. Defendant demurs. *Per Cur.* the ante-date of the Writ will not suffice, if the proceeding be after. And Judgment *pro Quer.* 3 *Keb.* *Cbancy and Rutter*.

And

And as to Pleading, as to the Time, *Richardson and Pricket's Case* is to be observed. The Plaintiff supposed the Arrest and Imprisonment to be 10 Decemb. 29 Eliz. Defendant pleads by virtue of a Warrant from the Sheriff he did arrest and imprison him the 2^d and 3^d day of December before; *absque hoc* that he was guilty before or after, &c. Plaintiff Replies, He was guilty of the *Trespass*, &c. after the 3^d day of December, *prout in Narratione sua specificatur*, and Issue upon this, and well enough; tho' he saith only, he was guilty after the 3^d day; but saith not, and before the Action brought. For when its said, He was guilty after the 3^d day, &c. *prout, &c.* it is to be intended to be the 3^d day, and the day of which he Counted, *Cro. El. 95. Richardson and Pricket.*

To all the Imprisonment, but 11 Hours, the Defendant pleads *Not guilty*, and to the Imprisonment for 11 Hours he Justifies as Sheriff; for that the Plaintiff hindered him in the Execution of his Office, and said nothing to the *Vi & armis*, yet good, 1 *Sand. 78.* But this Case went further, 2 *Keb. 237.* the *Trespass* and False Imprisonment was laid the 1st of April, the Defendant Justifies at another day at *Warw.* as Sheriff, *absque hoc* that he was guilty the 1st of April, or at any time before or after, while he was Sheriff, or at any other place. *Per Cur.* This Traverse is Traverse of the Time. sufficient, and the Plaintiff must reply and shew, if there were any other Assault or Imprisonment. Also the Traversing the Time before and after, doth not lock up the Plaintiff from assigning another day and place, especially the thing being Local, 1 *Sand. 78. 2 Keb. 237. Law and King.*

Justification

Justification in False Imprisonment by a Writ of *Supplicavit de bono gestu* out of Chancery, and arresting him by the Sheriffs Warrant thereupon The Justification being by an act in the same County, and justifying all the Time in the Declaration, tho' it do not agree with it in the Day, but concludes *quæ est eadem Transgressio* is good enough, the Day not being material; and the Replication is not good if it vary from the Day in the Declaration, *Cro. Car. 228. Tyler and Wall.*

Time, *quæ est eadem Transgressio.*

The Case was Trespass, &c. *ultimo die Octob. 6 Car.* and detaining him in Prison for two days. Defendant justifies, because *13 Aug. 6 Car.* a Writ of *Supplicavit* issued, and by Warrant from the Sheriff to the Defendant, he arrested the Plaintiff *21 Sept.* and detained him two days, &c. *quæ est eadem Transgressio, &c.*

Place, *quæ est eadem Transgressio.*

In False Imprisonment in *London versus W. Defendant* justifies in *Norfolk*, by force of a Warrant to the Sheriff *quæ est eadem Transgressio, absque hoc* that he is guilty in *London.* Plaintiff demurrs generally:

Traverse double.

1. Because the Plea is double; for the Justification in *Norfolk*, *quæ est eadem Transgressio*, had been sufficient without more, and then the Traverse makes it double. But *per Cur.* you shall not

General Demurrer.

take advantage of this upon a General Demurrer, *1 Roll. Rep. 221. Bateman and Woodcock.*

Warrant, *hic in Cur. in prolat.*

2. He Justifies by Warrant, and saith not *hic* this in Court; for it appears to be executed, and that the Warrant is returned to the Sheriff. And so for this last Point is *1 Roll. Rep. 327. Curtis and Dowty's Case.*

In False Imprisonment the Defendant justifies ^{Justifica-} (as Sheriff) the taking the Plaintiff by force of ^{tion local.} a *Capias* directed to him at D. within his County of G. where the Plaintiff declares of an Imprisonment in another County; there the Traverse of the County is good. For the Defendant cannot take the Plaintiff by force of the said Process in any other County than where he is Sheriff, and so the Justification is Local; 3 Leon. 97. in *Partridge and Pool's Case*.

The Defendant justifies the Arrest ^{Justifica-} *quousque* Bond given to appear in B. R. ^{tion.} *absque hoc* that at any time he did Arrest without reasonable Cause, until he gave such Bond. Plaintiff demurrs generally. *Per Cur.* The Justification is good, and the Plaintiff should have Traversed ^{Traverse.} *absque hoc* that he was arrested and detained till Obligation to appear in B. R. 3 Keb. 165. *Dawson and Rawlinson*.

False Imprisonment. Defendant justifies by Arrest, by virtue of a Warrant of the Sheriff on a ^{*De injuria sua propria*} *Latitat*. The Plaintiff replies, ^{to a Justification by} *De injuria sua propria absque tali causa*. This is naught upon Demurrer, ^{virtue of a} being Matter of Record; but Issue being taken ^{*Latitat* and *Warrant*.} upon it, and being in the Affirmative, its a *Fee-fail*, and good after Verdict. Judgment *pro Quer.* 1 Keb. 125, 164. *Beesly and Walker*. So *Osborn and Brook's Case*.

The Defendant justifies in False Imprisonment, because a Writ of *Vi Laica removenda* came to the Sheriff to remove the Force. The Plea need not say, they found him *resistentem in eâ parte*. *Vid. supra tit. Vi Laica removenda*.

The Office and Duty of Sheriffs, &c.

President,

Traverse, That the Defendant was in Custody by force of a Warrant made upon one Writ, and not by Warrant upon another, 1 *Sand.* 19.

Pleading by the Sheriffs Baliffs.

Justification in Trespass, Trover, &c.

On Execution.

Where the Sheriff justifies by Execution, he must plead, That he Retorned the Writ. *Secus* of a Bayliff, 1 *Leon.* 134. *Parkes and Mosse.*

Trover,
and no
Conversion
confest in
the Plea.

In Trover of 300 Sheep 1 *Dec.* 36 *El.* Defendant pleads, That he was Sheriff of *Com. Line.* and that *J.S.* recoverd against the Plaintiff 100 *l.* and upon that a *Fieri facias*, which Writ was Retornable *Craſtin. animar.* 35 *Eliz.* that this was delivered to him 1 *Octob.* 30 *El.* that he on the 20th of *Octob.* took the said 300 Sheep, and on 22 *Oct.* sold 104 Sheep for 40 *l.* and that the other 192 Sheep remained *pro defectu emptorum*; and at the same Day of *Craſtin. animar.* he Retorned the said Writ, and all this Matter, the which is the same Conversion, *absque hoc* that he Converted them *aliter vel alio modo.* *Per Cur.* The Plea is insufficient;

1. Because by his Plea he doth not confest any Conversion, and then the Traverse is ill. He ought upon this Matter to have pleaded *Not guilty*, and given it in Evidence.

Traverse.

2. Because the Declaration supposeth the Trover and Conversion to be the 1st of *Dec.* 36 *El.* and he justifies the Conversion in *Octob.* 35 *El.* so he meets not with the Plaintiff in time, and therefore

therefore he ought to have Traversed it, and the Traverser *aliter vel alio modo* shall never answer to the time, but to the manner of the Conversion.

Traverser
*aliter vel
alio modo,*
to what it
extends.

3. He makes not any Justification for four of the Sheep, but that he seized them; but he shews not what he did with them, *Cro. El. 433. Asene and Sanderfon.*

Scire fac. upon a Judgment in Debt. Defendant pleads a *Fieri fac.* directed to the Sheriff of L. for levying the Debt, and he by force of it took divers Sheep of the Defendants for the Debt, and yet detains them. *Per Cur.* Its a good Plea, altho' he do not alledge that the Writ is Retorned, and altho' the Writ is Conditional, *Ita quod habeas denarios, &c.* for the Plaintiff hath remedy against the Sheriff, and the Execution is lawful, which the Defendant cannot resist. So *Rooke's Case, vid. ante.*

That the
Sheriff
levied the
Debt, a
good Plea
in *Scire
fac.*

If in False Imprisonment the Defendant justifies by a *Capias* of the Sheriff, and a Warrant of the Sheriff to himself, there *De injuria sua propria* generally is not a good Plea; because a Matter of Record is parcel of the Cause: But there he ought to say, *De injuria sua propria*, and traverse the Warrant, which is Matter *en fait*, 8 Rep. *Croger's Case.*

Where *De
injuria sua
propria* is,
not a good
Plea.

D. brought Action of Assault, Battery and Imprisonment of his Wife against W. and W. in C. B. Defendants plead a Special Justification, (*viz.*) That in Nov. 2 *Fac.* Action of Trespass was brought by A. against Julian G. and on General Issue found for Julian G. and Judgment for her; and afterwards, and before Execution, Julian G. marries the Plaintiff D. and afterwards

Execution.

Writ of Error was brought in B. R. and upon a *Scire facias* against the said *Julian*, Judgment in C. B. was Reversed; and afterwards *Ca. sa.* was directed to *W. and W.* the Sheriff to take the said *Julian G.* and they took her; with an Averment, That the said *Julian G.* and the Wife of the now Plaintiff was one and the same person.

Trespafs
vers. A.
and his
Feme, the
Feme after
marries,
and her
first Name
continued
in all pro-
ceedings.

Plaintiff demurrs; because when the Warrant is against *Julian G.* there is no such *Julian G.* for by her marriage with the Plaintiff she had another Name, and his Averment cannot help him, because it agrees not with his Warrant: But *aliter*, had the Variance been in the Name of Baptism only.

But *per Cur.* the *Scire facias* was according to the Judgment in the C. B. and well then might all the subsequent Process be so: But if the Husband had come upon the *Scire facias*, and shewed how that she was Covert, then the Action ought to be against both of them And,

2. The parties themselves, in all the proceedings throughout, have all admitted that she is the same person, and had the same Name, and they shall be concluded from saying the contrary. And tho' the Sheriff had shewed the Marriage, this was but a bare Allegation and Suggestion of the Sheriff, and it appears not whether it were Judicially so or not.

A bare
Allegation
of the
Sheriff,
doth not
make a
thing
appear
Judicially.

3. It would be dangerous for the Sheriff to Return a *Non est inventus*; for because the parties have all admitted her Name to be so in all proceedings, the Sheriff shall be *Estopped* also, 3 H. 7. 10. and then Action on the Case would lye on the false Return, if the Woman should be in the company of the Sheriff, and the party shew her to the Sheriff, and she escape, 1 Brownl. 216.

Doyley and Webb, 2 Bulstrode 80. mesme Case.

In Trespafs for taking Goods. Defendant pleads a Recovery in the Court of *Dorchester*, in Debt against the Plaintiff, and Execution upon this by *Fieri fac.* and Justifies the taking, appraising and sale (by Consent) of the Plaintiff, in part of the satisfaction of the Judgment recovered, *Quæ est eadem captio.* Plaintiff demurs; because the Defendant varying in the time of the taking, from the time alledged in the Declaration, he ought to traverse any other Taking; for the same Goods may be taken at several times, and the *Quæ est eadem captio* is not sufficient; as *Marshall and Dicken's Case, Sir Tho. Jones p. 146. Allen and Chamming.*

But *per Cur.* the Averment sufficeth, *Keilw. 27. 1 Bulstr. 138. Cro. Car. 228.*

Justification in Trespafs, Assault and Battery, by Process out of an Inferiour Court of Record, is not good without shewing whether the Court was holden by Charter or Prescription, *Sir Tho. Jones p. 165. Strode and Deering.*

In Trespafs of Battery, the Defendant justifies the Process to arrest one *Wood*, and the Plaintiff would have Rescued him, whereupon he did *molliter manus imponere.*

The Plaintiff Replied, *De injuria sua propria, De injuria absque hoc* that the Defendant had *virtute* of such *sua propria* a Warrant taken, as that by which the Defendant Justified. Defendant demurs.

Per Cur. The Justification is sufficient, and better by the admittance in the Replication, than if the Issue had been offered *De injuria sua propria* generally without such Traverse, *2 Keb. 293. Haywood and Wood.*

with a
Special
Traverse.

That
which is
confessed
and avoid-
ed, not to
be traver-
sed.

In Trespals and Imprisonment, the Defendant Justifies by a *Capias*, and that the Plaintiff did afterwards Escape, and he being Plaintiff did follow him by virtue of the said Warrant, taken out upon the *Capias*.

Plaintiff Replies, He escaped by the License of the Sheriff, and traverseth the Later taking by virtue of the Warrant.

Per Cur. The Traverse is idle, because the Plaintiff had sufficiently confessed and avoided; and if he escaped by the Sheriffs License, that ought to be the thing put in Issue, and not the Traverse, 1 *Brownl.* 197. *Hatton and Hunn.*

C H A P. XXV.

Of Attachments against the Sheriff; where and in what Cases it lies or not. And where against him for a thing done out of his Office. Attachment of Money in the Sheriffs hands. Of Attachments against others, and against the Goods, and the Return. Of Amerciaments, where and in what Cases the Sheriff is to be amerced.

Of Attachments against the Sheriff, where and in what Cases it Lies or not.

A Trachment shall not be granted against the High-sheriff, for the Contempt of his Bayliff, *March p. 54.*

Attachment against the Sheriff for a frivolous Return of an *Habeas Corpus*. The Return was, That the Committee for poor Prisoners ordered he should not bring the Body till they had consulted with the Lord Chief Justices: And an *alias Habeas Corpus* under pain of 80 l. *Stiles Rep. 422.*

Attachmant against a Sheriff for refusing to bring Money into Court.

Attachment lies by the Rules of the *Kings-Bench*, for not making a Return of *Habeas Corpus*, upon a *pluries Habeas Corpus* issued forth, *Pr. Reg. tit. Attachment.*

Attachment lies against a Bayliff, for executing a Process of this Court, against a Rule of the Court having notice, *Pr. Reg. ibid:*

Not for the Contempt of his Bayliffs For frivolous return of an *Hab. Corpus.*

For refusing to bring Money into Court. Not return of *Habeas Corpus.*

For executing Process against the Rule of Court.

Against a Sheriff when he was out of his Office for a misdemeanor during his Office.

It was a doubt, whether Attachment lies against a Sheriff when he was out of his Office for a Misdemeanor in his Office. *Capias* was delivered to the Sheriff against J. S. and the Plaintiff shews him to the Sheriff, and he saw him, but he turned about and said I cannot see him, and after Retorns *non est inventus*, and then his Office determined. *Dodderidge and Jones* granted an Attachment against him, tho' he was out of his Office, for this Contempt during his Office, *Latch p. 176. and p. 217. Dixons's Case.* But they two denied an Attachment against a late Sheriff, for retorning *non invenit emptores*, and then his Office determines, and he detained the Goods in his hands.

No attachment in the Sheriff hands.

Note, Attachment of Money in the Sheriffs hand is void, for the Sheriff at the Return of the Writ ought to answer for the Money, 1 *Leon. p. 264.*

Attachment against others.

Attachment is a Non omittas.

An Attachment against a Man is a *non omittas* in it self, and the Sheriff may break his House to take him, for the Writ is for his person, 1 *Rel. Rep. 339. Briggs's Case.*

* On Attachment the Sheriffs ought to Return the certainty of the Goods and why, and the value.

If the Party Defendant be Attached, or Distrained by Process out of any Court of Record, or County by force of a *Justices*, &c. Hundred Court, or any Court Baron, and make default, the Goods or Issues are forfeited, and upon the Attachment the Sheriff, or other Officer may take the Goods with them. * And this is the Reason, that upon the Attachment the Sheriff or other Officer ought to Return the certainty of the Goods and the value; and it is not sufficient to Return, that he hath Attached or

or Distrained the Defendant by Goods to such a value, and so upon the Distress, the Issues must be returned in certain, because they are upon default to be forfeited, *vide supra tit. original Process, 3 Inst. 228.*

The Sheriff is to bring an Attachment upon the Writ of *ne exeat regnum* until he finds Sureties, 1 *Roll. Rep. 313.*

Where and in what Cases the Sheriff is to be Amerced.

The Sheriff is to be amerced for the faults of his Special Bayliffs, for the Sheriff is the Officer to the Court and not they. But if the Sheriff Return *quod mandavit ballivo, &c. qui respondit, &c.* if the Return is sufficient, and a default is for not doing according to the Return, the Bayliff shall be amerced and not the Sheriff. As if the Sheriff Return *quod mandavit ballivo Libertatis, &c. qui respondit qd' cepit J. S.* according to the Writ, and he shall be here at the day, if he bring him not at the day, the Bayliff shall be amerced and not the Sheriff. But if the Chamberlain of the County *Palatin of Chester*, makes an insufficient Return to the Court of Common Pleas, upon a Writ issued out of that Court, the Sheriff shall be amerced, because he is the Officer responsible to the Court. Now in *Palmer and Marshes Case, 1 Brownl. 36.* If the Sheriff Return *quod mandavit ballivo Libertatis qui sic respondit*, and return an insufficient Return in Law, the Sheriff shall be amerced, for he might have returned, *ballivus nullum responsum dedit.* If the Sheriff Return *feci retorum istius brevis G. & L. [ballivis Libertatis G. qui habent retorum brevium]*

For the faults of his Special Bayliffs.

Where the Bayliff shall be amerced and not the Sheriff.

Amerced for the insufficient Return of the Bayliff of a Liberty.

*vium & Executionem eorundem, qui mihi reman-
runt, qd̄ istud mandatum adeo tarde receperunt per
manus Attornat^o sequentis qd̄ nihil inde facere potue-
runt*; the Sheriff shall be amerced for this Re-
torn, for he ought to have Retorned it to the
Bayliff time enough for them to serve it, *Trin.*
39 *El. B. R. Palmer and Marsh, 1 Ed. 1. 13. b.*

If no Retorn be made for part by a Bayliff
of a Liberty, the Sheriff shall be amerced. As
in a *Præcipe qd̄ reddat*, if at the grand *Cap^e* the
Sheriff Retorn *quod mandavit* *¶* Bayliff of a
Franchise, &c. who retorned, that he had taken
the Land into the Kings hands; and speaks no-
thing that he had summoned the Tenant, as
the Writ commands him, the Sheriff in this case
shall be amerced, for that no Retorn is made of
part, 4 *H. 6. 25. b.*

By the Stat. of 17 *H. 8. 24.* Amerciaments for
insufficient Retorns of Writs, made by Baliffs
of Liberties, shall be set upon the Heads of such
Bayliffs, and not upon the Sheriff, nor upon the
Lord of the Franchise.

Increase
of Amerci-
aments.

Amercia-
ment estre-
ated with
a *Respe-
ciuat.*

Amercia-
ment for
not Retorn.

If the Sheriff be amerced by the Court for the
not doing a thing belonging to his Office; and
yet he continues to neglect to do it contrary to
the Rule of the Court, the Court may increase
the Amerciaments till he do his Duty therein.
But Amerciaments set upon the Sheriff upon the
motion of the Party, if they be not Estreated
into the *Exchequer*, may be with a *Respectuat^o*
(that is) be respited) if the Party grieved, who
caused him to be amerced will consent there-
unto, otherwise not, *Pract. Reg. p. 18.*

If upon a *Latitat* the Sheriff do Retorn a *Cepi
Corpus*, and the Party arrested on this Process
doth not appear at the day of the Retorn, the
Sheriff may be amerced by the Court; yet tho'
the Sheriff be amerced, if the Party arrested do
appear

appear within a week after the day he ought to have appeared, the Amerciament may be taken of the Sheriff, *Pract. Reg.* 18.

If a Debt be levied by *Fieri fac'* and delivered to the Plaintiff, and the Writ is not returned, yet the Execution and Sale is good, but the Sheriff shall be amerced for the *Non-return* of the Writ, *5 Rep. Hoes Case*.

It was moved to have the Sheriff amerced for returning too small Issues: Coke said we cannot do so, for (saith he) it doth not lie in our Conscience, whether they are too small or not, but you are put to your Amerciament, *1 Roll. Rep.* 339. *Goates's Case*.

A Bishop shall be amerced for an Escape 100*l.* a Gaoler shall be amerced for a negligent Escape of a Person Attaint 100*l.* and if one convict 5*l.* *2 Inst.* 28.

An *Exigent* which was delivered of Record (to the Sheriff) was imbefilled, and the Copy thereof was returned by the Sheriff, and he was amerced for the Return of the Copy at 30*l.* and for imbefilling the *Exigent* at 20*l.* *5 H.* 4-5.

C H A P. XXVI.

Remedy against Sheriffs, Bayliffs, &c. for Malefeasance. As imbesilling an Exigent, for entering into a Corporation which had Retorna Brevium. For not delivering a Superfedeas to the new Sheriff. For concealing or substracting a Writ. For refusing sufficient Bail, and forcing to find extraordinary Bail. For taking sufficient Bail. For not bringing Money levied by Fieri fac' into Court. And Stat. of Limitations pleaded.

Remedy against Sheriffs, Bayliffs, &c.

For quashing an
Essoyn.

IF the Sheriff in his Court quash an *Essoyn* Erroneously, without the consent of the Suitors; Action on the Case lies against him, for the Party cannot have his false Judgment on this, 26 *Affize* 45.

Retorns
Trop petit
Issues.

If a *Distingas* Issues to the Sheriff to Distrain the Defendant in the Action by all his Lands and Chattels, &c. and the Sheriff Retorns *trop petit Issues*, (too small Issues) altho' an Averment lies by the Stat. *W. 2. c. 43*. Yet the Plaintiff may well have his Action on the Case against the Sheriff, because it appeareth by the words of the Statute that this is a false Return, and the words are *qd' Distringeret*, by all his Lands and Chattels, *Ita qd' de exitibus eorum*, &c. so that if he do not Return all the Issues, he does not as he is commanded. The Statute ordains that the King shall have the Issues, but restrains not any Remedy that the Plaintiff had at Common Law, 3 *Car. 1. Dorothy Bennet against the Sheriff of London.*

If

Chap. 26. Of Remedies against Sheriffs, &c. 381

If the Sheriff imbeſil an *Exigent* delivered to him at my Suit, Action on the Caſe lies *ſam* For imbeſilling an *Exigent*.
pro Dom' Rege quam pro meipſo, 41 *Aſſize* 12.

A Knight for the County brought Action For not against the Sheriff, for not levying 10*l.* 4*s.* for levying his expences in attendance in Parliament, 17 *Ed.* Expences in Parliam-
ment.
3 *B. R. Rot.*

The Sheriff was puniſhed in the *Star-chamber*, for neglecting to Execute a *Capias Uſlagat'* after Judgment, *Hob.* 264.

Action on the Caſe lies againſt a Sheriff, for For entring
into a Cor-
poration
which had
retorna
brevium. entring a Corporation which had *Retorna bre-
vium*, 1 *Roll. Rep.* 118, 119. *The Town of Darby*
verſ. Foxben.

J. S. recovered a Debt againſt *Calthrop*, and procured a Writ of Execution to *W. P. Sheriff* of *D.* but before the Writ was executed, *Calthrop* procured a *Superſedeas* to the ſaid *P.* who when his time was out, delivered all the Writs to the new Sheriff, but not this *Superſedeas*; ſo that *J. S.* procures a new Writ of Execution to the new Sheriff, upon which 18 of *Calthrop's* For not
delivering
a *Superſe-
deas* to the
new Sheriff Beasts were taken. And he brings his Action against *P.* for not delivering over the *Superſedeas*. By the Prothonotaries, the Courſe is to take a new Writ to the new Sheriff. But the Court inclined that the Action lay; for the Writ to the old Sheriff is, *quod comitat' præd' una cum bre-
vibus rotulis memorandis & omnibus officium illud
tangen.* And an Action will lye, for not delivering ſome Writs to the new Sheriff, which is not returned, as *Estrepmnt*, *Mod. Rep.* 222. *Calthrop and Phillips.*

He at whoſe Suit the Party arreſted Reſcues himſelf and Eſcapes from a Special Bayliſſ or Bayliſſ errant, ſhall have Action againſt the Sheriff only. *Vid. tit. Under-ſheriff, Atterton and Harwood.*

Warrant

Against un-
der-sheriff
for conceal-
ing a Writ

Warrant on *Fieri fac'* is directed to the Under-sheriff of a Liberty, and he levies the Debt but conceals the Writ; Action on the Case lies against him; *M. 12 Jac. B. R. Bell and Satesby.*

Against the
Sheriffs
Deputy for
not substra-
cting a
Writ.
Bayliff of
Liberty
chargeable
for his
Servant.

If the Sheriffs Deputy substracts a Writ which is to be returned, Action lies against the Sheriff. And yet the Deputy may be punished for this falsity by deceit, 19 *H. 6. 71. b.*

Servant of a Baliff of a Franchise, Sworn by Deputation to serve Process but of such a Sum, and he serves Process of a greater Sum without Warrant, and levies the Money, and parts with it, the Bayliff shall be chargeable, *Hutley p. 12.*

For not
discharg-
ing a Pri-
soner with-
out paying
Action
Money.

Sir *John Lenthal* (his Prisoner having agreed with his Creditors) would not discharge him, without paying to him Action-Money, By *Glyn S. J.* there are two Remedies against him. Action of false Imprisonment, or Indictment for Extortion. Fees must be paid and no more; *Stiles Rep. 454. Welberly and Sir John Lenthall.*

Vid. tit. Fees.

But Bayliff of a Liberty is not chargeable for the Gaoler. *Vid. supra.*

As for what Remedy there is against the Sheriff for refusing sufficient Bail, the Law stands thus.

For refu-
sing suffi-
cient Bail.

If a Sheriff, or Mayor refuse sufficient Bail, against the Statute of 23 *H. 6. c. 10.* by which the Penalty of 40*l.* is given, one Moiety to the King, and the other to the Party who will Sue for it. In this Case no Action lies by Bill in the *Kings Bench* against the Sheriff, &c. Because the Statute of 18 *Eliz.* is, *That no person shall*

shall Sue any Penal Statute but by information, or original Action and not otherwise.

But Note, It is not limited by the Statute of 23 H. 6. c. 10. how the Penalty shall be recovered, but generally that he shall forfeit 40 l. one Moie-ty to the King, and the other to him that Sues, 3 Inst. 194, 6 Rep. 17. *Gregories's Case*, 1 *Rolls Ab.* 537. *Whidiston and Clerk*.

Action on the Case doth not lie against a She-
riff, for suffering a Prisoner to go at large, up-
on the taking insufficient Bail. *vid. supra. pasc. 2 Jac.*
C. B. in the Case of the Lady *Mounson* against
the Sheriff of *Lincoln*, for taking insufficient se-
curity upon Stat. of 23 H. 6. It was adjudged, That
the death of one of the Sheriffs did not abate the
Writ, 2 *Sanders*. 5. *Postern and Hanson*, *Hutton p.*
120. *Metcalf and Hodyson p.* 77. *Trevor and Mi-*
chelbourn, 1 *Keb.* 56. *Stalford and Bateman*.

For taking
insufficient
Bail.

Action on the Case lies against the Sheriff, Action of
for that he levied such a Sum of Money on a the Case
Fieri fac' at the Suit of the Plaintiff, and brought against the
not the Money into the Court at the day of Sheriff for
the Return. not bring-
ing Money
into Court

The Defendant pleaded the Statute of Li-
mitations 21 *Jac.* Its Ill. An *indebitatus Assumpsit*
would lye against the Sheriff in this Case, or
against his Executors, and then the Statute might
be pleaded. If the *Fieri fac'* had been returned,
the Action would have been grounded upon the
Record, and its the Sheriffs fault that the Writ
is not returned: But however *Per Cur'*, the Judg-
ment in this Court is the Foundation of the
Action. And so Judgment *pro Quer.* that is not
within the Statute of Limitations, *Mod. Rep.* 24.

levied by
Scire fac'.
Statute of
Limitati-
ons
pleaded.

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an Action on the Case against a Bayliff for concealing a *Scire fac*, after he had levied the Money upon it, 1 Roll. Rep. 78.

One is Arrested for 600 l. and forced to find extraordinary Bail. Action on the Case lies.

C H A P. XXVII.

Of the Sberiffs demeanour in Assignment of Dower, and the Retorn. The Proclamations. The Sberiffs Office about Partition. His demeanour in the Writ De Ventre inspiciendo. About Retorning a Force. About a Vi Laica removenda. How the Sberiff shall demean himself in a Writ of Enquiry of Waste; and of the Retorns thereof. Of the Writ of Estrepement, and the Retorn. The Sberiffs Office in a Writ of De Excommunicato capiendo. Retorns of Sberiffs, as to Clerks. Retorn of a Writ of Entry. Retorn of an Affize, Quare Impedit, De Malefactoribus in parcis.

Of the Sberiffs demeanour in Assignment of Dower, and the Retorn.

THe Sheriff may not assign Dower against Common Right.

Mannor. If the Sheriff assign one Mannor upon Dower recovered of three Mannors, its not good; it ought to be a Third part of each: But he may Assign all the Meadow, Pasture, &c. *Mo. 12. n. 47. — 19. n. 66. 12 Ed. 4. 2. contra.*

And

And if a Woman be dowable of a Mannor, the Sheriff may assign the Third part of the Mannor in Common instead of Dower, without setting out by Metes and Bounds; so assigned in Chancery, *Anc. Ent. Qu. Imp. 529. 10.*

If a Woman be endowed of an Advowson, she shall be assigned the Third part of the Advowson, and not only the Third part of the profits, (*viz.*) the Third presentation; 17 Ed. 3. 8. b.

If a Woman recover Dower of a Rectory Improprate where there is not any Glebe; the Sheriff shall put her in possession of the Third part of the Tythes generally, and not of the Tythes of the Land, which issue out of any Third part of the Land of the Parish in certain, *Mich. 9 Jac. B. per Cur.*

The Writ of Dower was *de Tertia parte Rectorie de D.* and upon that the Grand Cape issued, *Cape in manus nostras tertiam partem Rectoria, &c.* and the Sheriff by Colour of this Writ took the Tythes, severed from the Nine parts, &c. Its an ill Seisure, 1 Leon. p. 92. *Mitchel and Hide.*

The Sheriff may assign a Rent in lieu of Dower, 20 Aff. 41. 7 H. 6. 34. So a Rent out of the same Land.

If the Sheriff assign Dower by Writ to him directed, and doth not Retorn the Writ, yet she is Lawfully seised of Dower. *Aliter* in a partition by Writ; for there a second Judgment ought to be given, *Cro. El. Ashborough's Case.*

The Retorn of the Sheriff in Assignment of Dower need not have such precise Certainty, as Declarations and Indictments; therefore the Retorn was, *Quod habere fecit seisinam de 13 Mesuagii, sive Tenementis, cum terris & pratis eisdem pertinentibus tunc vel nuper in tenura, &c.* its good enough; and when he saith in the end, he deli-

The Office and Duty of Sheriffs, &c.

vered them all by Metes and Bounds, it is sufficient, *Cro. Jac.* 621. *Sir Ch. Howard's Case*.

Amend-
ment of
Assign-
ment of
Dower.

It was moved for amendment of Assignment of Dower, being Under-value, and on refusal of an equal division profered to him by the Dowager, with liberty to chuse which two parts he would for the Heir. Which the Court Ordered, and Committed the Sheriff for taking of 60*l.* of the Lady *Longvill*, to execute his Writ of Execution; and Information was brought against him, 1 *Keb.* 743. *Longvill's Case*.

As to Proclamations in Dower.

Where the Sheriff Returned, He had proclaimed the Contents of the Writ; this was held insufficient, for he must Return, That he made Summons of the Land.

The Sheriff upon the Statute of 31 *Eliz.* if he make Proclamation at the most usual Door of the Church, tho' part of the Land lye in another Town in the same County its sufficient, tho' the words of the Statute are *Parishes, or Chappels*. And tho' there be no actual Summons, but only the Names of the Summoners, its good; for that is all the Form at Common Law, and the Statute alters not that, *Hob. p.* 133. *Allen and Walker*.

The Forms of Returns; as Proclamation at the Church-door, the Return of a Writ of *View*, the Return of a Writ of *Seisin in Dower*, the Return of a Writ of *Enquiry of Damages in Dower*, *vid. Dalton c.* 56.

In Dower of Freehold in *M. magna* and *M. parva*, the Sheriff returned *pleg' de prosequendo* *J. D.* *J. R.* and the Names of the Summoners *J. D.* and *R. F.* and after the Summons made, and by the space of 14 Days and more, before the Return of the said Writ, at the most usual Church-door of *M. magna*, where part of the Tenements lay, on the 27th of *Octob.* being the Lords-day immediately after Sermon in that Church, he publickly proclaimed all and singular things contained in the Writ, to be proclaimed according to the form of the Statute in that behalf made and provided, *L.P. Armig. Vio.*

Per. Cur. Its sufficient to make Proclamation at any of the Churches where the Lands lye, and he need not do it at all: But because he said, He had caused to be proclaimed all and singular in that Writ contained, and saith not what, the Return was adjudged Insufficient, 1 *Browl.* 126. *Allen and Walter.*

Upon a Return of a Writ of Enquiry in Dower Errors were assigned: Return of a Writ of Enquiry in Dower.

1. The Original Writ appears not to be Returned according to the Statute; for the year doth not appear when it was Returned.

2. The Proclamation made by the Sheriff, appears not to be where the Land lies.

3. The Return does not mention that the Proclamation was after the Summons, as it ought, *Hob. Allen's Case.*

4. It is not said, He did make Proclamation on the Land; but the words *secundum formam Statuti* extend far.

Quare, For the *Certiorari* was not well Returned in *B. R.* *Stiles Rep.* 67. *Tbyn and Tbyn.*

Note, No Error can be Assigned on the Sheriffs act in giving the Seisin, and retorning thereof, except it is where Damages are to be Enquired; for if any of them be ill, then the recovery of the Damages being entire, its ill for all, *Cro. Jac. 621. Sir Ch. Howard's Case.*

Summons made in some parts of the Land within the Vill, is good.

If Summons be made in some part of the Land within the Vill, its good; neither is it necessary to make the Proclamation where the Summons is, *Stiles Rep. 91. Thyn.*

Presidents.

Summons, Retorn of the Writ of *Seisin*, and Execution upon it in Dower, 2 *Sand. 45, 92. Hesketh and Lee.*

On *Habere fac' seisinam*, in a Writ of Dower of the Third part, the Sheriff Retorned, That he offered to the Demandants the Seisin of the Third part of the Tenements aforesaid by Metes and Bounds in certain, according to the Tenor of the Writ, and they refused to accept them of him. *Per Cur.* The Entry of the Demandants is now lawful; and the Court refused to award *Habere fac' seisinam de novo*, as a thing never known, *Dyer 278.*

A. brought Dower against the Son, to be endowed of Lands, of which her Husband (the Father of the Defendant) died seised. A Writ issued forth to Enquire of the Damages, and he made his Warrant to J. S. to take the Inquest. It was the Opinion of the Justices, That he cannot in this case make a Deputy, because it was a Judicial act, and he must do it in person, *Noy 21. Randal's Case.*

Sheriff's

Sheriff's demeanour in the Writ De Ventre Inspiciendo.

Writ was directed to the Sheriff, That he should cause *D.&c.* to be viewed by 12 Knights, and searched by 12 Women in the presence of the 12 Knights; & *ad tractandum per ubera & ad ventrem inspiciend'*, whether she were with Child or not, and to Certifie the same into the Common-Bench; and if she were with Child, to Certifie how long time in their Judgments, & *quando sit paritura*: The Sheriff Retorned, That she was Twenty weeks gone with Child, and that within Twenty weeks *fuit paritura*.

Whereupon another Writ issued out of the Common-Bench, commanding the Sheriff safely to keep her in such an House, and that the Doors should be well guarded; and that every day he would cause her to be viewed by some of the Women named in the Writ (wherein they were named;) and that when she should be Delivered, some of them should be with her to view her Birth, whether it be Male or Female.

Upon this the Sheriff Retorned, He had caused her to be kept, &c. and that such a day she was Delivered of a Daughter, *Cro.El.566. Willoughby's Case.*

But in *Theaker's Case*, the Woman to be Inspected was a *Feme Covert*, (to a second Husband) and she was with Child by the first; they took not the same course, but left her with her Husband, he entring into Recognizance, that she should not remove from the House wherein they inhabited, and that one or two of the Women (Retorned by the Sheriff) should see her every

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day, and that two or three of them should be present at her Travail, *Cro. Jac.* 685, 686. *Theaker's Case.*

The Sheriff's Office about Partition, and how he is to demean himself therein.

He must
be upon
the Land
in person.

No Aver-
ment
against
the Return
shd.

At the time of the Partition made, the High-sheriff must be upon the Land in person: And if Exception be taken at the Bar before the Writ be returned and filed, a New Writ shall be awarded; but if the Sheriff in such case Returneth, That he was there in proper person, and this Return be received and the Writ filed, the party cannot Aver against the Return, nor shall have Error, *Cro. El.* 9. *Clay's Case.*

When
Writ of
Error lies
upon Par-
tition, or
not.

In a Writ of Partition, if Judgment be given *quod partitio fiat*, and upon this a VVrit is directed to the Sheriff, to make partition; before that this is Executed and Returned no VVrit of Error lies upon the first Judgment, because before the last Judgment (which ought to be, *Quod partitio prædicta foret forma & stabilis in perpetuum*) the Plaintiff may be Nonsuited; or he may upon the Sheriff's Return suggest to the Court, That the Partition is not equal, and also have a New Partition, 1 *Rolls Abridgm.* 750. *The Lord Berkley and the Countess of Warwick.*

The Form of the Return of a VVrit of Partition, *vide Dalt.* c. 68.

Sheriffs

Sheriff's Office about removing a Force.

The party grieved may have a Writ upon the Statute of *Northampton*, 2 Ed. 3. cap. 3. directed to the Sheriff, to remove the Force; and upon this the Sheriff may imprison and justify in False Imprisonment, as was *Levett and Farrar's Case*; and so may the Under-sheriff, as that Case was.

In False Imprisonment against the Sheriff, the Defendant justifies, for that a Writ upon the Statute of *Northampton* was awarded 30 July 32 Eliz. to the Sheriff and Justices of the Peace, to remove a Force; and that he being Under-sheriff, by the Commandment of the Sheriff went to the place and found the Force; and because he was not able to remove it, he made Proclamation, That every one should depart, and leave their Weapons, &c. and afterwards he enquired of the Force; and it being found that the Plaintiff was one of them, he arrested him, and imprisoned him, *Cro. Eliz.* 294. *Levett and Farrar*.

Per Cur. The Plea is good. And these Points Plea were Adjudged:

1. When the Writ is directed to the Sheriff by the name of his Office, and not by a particular Name, nor doth expressly Command him to do it in person, the Under-sheriff may do it; Done by the Under-sheriff. for its a Writ grounded on the Statute, and not a Commission, for then it had been otherwise.

2. He may Arrest and Imprison at another time upon the Enquiry, tho' the Force were removed before his coming; and he may Enquire who did it.

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3. It shall be intended he continued Under-sheriff, when in the same Plea it is alledged he was Under-sheriff, and the contrary is not shewed, 2 Roll. Rep. 178.

If when the Sheriff comes to remove a Force, if then one hide himself in the Corner of the House, to the intent, &c. this is Force.

The Sheriff's Office in a Vi Laica removenda.

Justifies
in False
Imprison-
ment.

In False Imprisonment the Defendant Justifies, because a Writ *De vi Laica removenda* came to the Sheriff, to remove the Force; and that the Sheriff came to the House, and the Defendant in Assistance of him, &c. and that there the Plaintiff *in domibus predictis ad pacem domus Regis disturbandam, &c. & eos residentes invenerit.*

Plaintiff demurs,

1. The Writ is, *Si aliquos in ea parte resistentes inveneritis*, and it is not here pleaded, That he found him resisting *in ea parte*, i. e. to keep possession. But *per Cur.* the words *in ea parte* ought to be necessarily intended. For when he saith, He came to the House to remove the Force, and the Plaintiff resisted him, then *sequitur* that he resisted him in removing the Force.

2. The Writ is, *aliquos*, and the Defendant had shewed Resistance by one only. But *per Cur.* *aliquos* includes *aliquem*.

3. He doth not aver, that it was *vis Laica & armata potestas*. But *per Cur.* it appears there was Force, and the very Resistance was a Force, 2 Roll. Rep. 177. Parson Clossy's Case.

Upon a *Vi Laica removenda*, if the Sheriff Return *Non inveni vim Laicam nec armatam potestatem*, the Lessee shall have Restitution in B. R.

Restitu-
tion.

upon

upon *Affidavit* that he was kept out with Force.

Upon this Writ the Sheriff ought not to remove the Incumbent, who is in Possession of the Church, be it by right or wrong, for the Sheriff is only to remove the force, and is to suffer the Incumbent to enjoy his Possession, *More* 462. *Roberts and Agmondsham.*

How Sheriff is to Demean himself in Proclamations.

In real Action. *Vid* Dower.

As to Acts of Parliament in former times.

Proclamations ought to be with Writ to the Sheriff to Proclaim, 2 *Rolls Rep.* 172.

Yet, if a Statute be not proclaimed, the Offences against it are punishable, *Dr. and Stud.* 146. b.

How the Sheriff shall Demean himself in a Writ of Inquiry of Wast. And of the Sheriffs Return thereupon. And of the Writ of Estrement.

In an Action of Wast upon Issue joyned, a Jury is Summoned to try the Cause, and in the interim to view the place wasted, and the Sheriff is to return the view. As to the President, *vid.* 2 *Sanders* 254. *Greene and Cole.*

The Sheriff must go in person to the place wasted, by Stat. *W. 2. c. 14. accedat ad Locum vaster of the Statum*, together with the Jurors, 2 *Inst.* 390. *view.*

Six Jurors at the least ought to have the view. And the Jury may view the place Wasted when the Officer is not present; and the Court upon the Tryal ought to examin, if the Jurors had the

Not necessary to return the view.

the view or not. But tho' the Jury ought to have the view, yet it is not necessary for the Officer to Return it, 2 *Sanders* 254, 255. *Greene and Cole*.

In Action of Wast assigned in a Wood, the Jury viewed the Wood only without entring into it: And it was held the same was sufficient. It would be too tedious for a Jury to view every stub of a Tree that had been Felled. Yet, if Wast be in several corners of a Wood, then the Jury is to have the view of every Corner; *aliter* where Wast is assigned in the whole Wood. And if Wast be assigned in every Room of an House, the view of the House generally is sufficient. And by *Dyer*, if Wast be assigned in several places, and of some of them the Jury had not the view, of that they may find no Wast done, 1 *Leon*. 276.

Jury examined of the view.

If an Issue ariseth in a Foreign County, the Jury shall not be examined of the view; and if the Jurors be not examined of the view when they should be examined, its Error.

Return of the Writ of Enquiry in Wast.

Virtute brevis Dom. Regis mihi direct' Ego A. B. Armig' Vic' Comit' præd' (tali die & anno) in propria persona mea accessi ad Locum vastatum in dicto brevi nominat' Et apud S. (the Vill wherein the place lies) feci Inquisitionem, &c. prout istud breve in se exigit & requirit.

Resid' Execationis istius brevis patet in quadam Inquisitione huic brevi annex'.

Inquisitio Indentata cap' apud G. in Com', &c. (tali die & anno) Coram A. B. Vic' Comit' præd' Virtute cujusdam brevis Domini Regis ei inde direct' & huic Inquisitioni consus' per Sacramentum A. B.

B. &c. (ad numerum 12) qui dicunt super Sacramentum suum qd' J. R. in brevi prad' nominat' fecit vastum venditionem & destructionem in omnibus in eod' brevi specificat', viz. permittend' duas cameras pretis 3 l. & unum stabulum pretii 20 s. esse disco-
opertum pro defectu reparationum earundem domorum per qd' grossum marem' eorundem Dom' per tempest' pluviales super illas descendentes putred' devenit. Et dicunt super Sacramentum suum qd' prad' J. R. aliud neque plus vastum venditionem seu destructionem fecit in domibus prad' In cujus rei Testimonium, &c.

Of the Enquiry of Wast.

This Enquiry of Wast differs from other Writs of Enquiry, which are but meer Inquests of Office. But here its a Verdict and in nature of a Verdict, and a Writ of Attaint lies: Therefore, where upon a Writ of Enquiry of Wast, 13 Jurors were returned, where there ought to be but 12, its Error. But in other Writs of Enquiry, it is usual to have more than 12, at the Sheriffs pleasure, there must not be under 12 tho' it be but an Enquest of Office, for it is taken *sans mise des parties, id est*, without Issue joyned. In a Writ of Enquiry of Wast upon *Demurrer* or *nihil dicit*, the Sheriff may enquire of it at another place than where the Wast was done, *Cro. Car. 414. King and Frish. 2 Inst. 390. Cro. El. 290. Warriford and Haddock.*

How differ
from other
Writs of
Enquiry.

Now as to the Juries finding Damages the Law is, That if Wast be assigned in three Houses and two Gardens, &c. and upon the Writ of Enquiry, Wast was found in the Houses and Gardens, and entire Damages given, its well, for it is the usual course to find entire Damages, and not severall for every of them, *Cro. Car. entire.*

Car.

Car. 414. King and Fitch. Lib. Intr. 620. 8 Rep. 61. But where the Writ of Wast and Count is in *domibus boscis & Gardinis*, and upon the Writ of Enquiry the Wast is found in *domibus & Gardinis*, and nothing in *boscis*, there the Plaintiff shall be in *Misericordia*; because he counts for Wast, in places where no Wast was committed in one of them. But where Wast was assigned in cutting down twenty Trees, and the Wast is found in cutting down two Trees, *aliter*.

If the Jury find Damages only to 8 s. the Plaintiff ought to have Judgment, for it ought to be above 40 s. *Winch Rep. 5. Sir G. Topping and King.*

Where executed.

If Wast be committed in two Villages, and the Sheriff hath executed his Office ill in one Village, and well in another, all shall be enquired of *de novo*, because the whole Inquisition was but one Inquest at one time: If Wast be assigned in divers Towns, the Sheriff and Jury must view all the places wasted in every Town, but he may enquire thereof in any one of the Towns, 2 *Inst. 390.*

Action of Wast lies in Ancient Demesne and why.

Note, Action of Wast lies not in ancient Demesne, because upon default at the grand Distress, there cannot be a Writ to the Sheriff, to enquire of the Wast as the Statute appoints. So 2 *Inst. 385.* That the Court fails of the Incidents to an Action of Wast, to award a Writ to the Sheriff to enquire of the Wast, 2 *Sanders 254. Grene's Case. 4 Rep. Fulwood's Case.*

What Return shall be good, or not.

A VVrit to the Sheriff to enquire of VVast, This Writ who Returns *mandavi Ballivo meo Libertatis, &c.* is a non. *qui nullum dedit responsum*, its an ill Return; *omittas.* and the Sheriff was amerced, and a *sicut alias* awarded; because in the executing this VVrit he is both Officer and Judge, which power cannot be committed to a Bayliff of a Liberry, and this VVrit is a *non omittas* in it self, and he hath power to return into the Franchise. But if after Appearance the Party appears its good, 2 Brownl. Rep. 240. Trin. 11. H. 7. f. 42. F. H. tit. return de Vic. 53. 11 H. 4. 21.

The place wasted, and treble value is to be recovered; now if VVast be made *sparsum* in a Waste to be recovered, and how. Close or VVood, the treble value shall be levied by *Fieri fac'* or by *Elegit*, and not by *Capias*, because *Capias* lies not upon the Original, 1 Brownl. 240.

The Sheriff makes a Precept to a Bayliff to Summon a Jury, who returned a Pannel which was parcel of the Record; and the Sheriff took the Inquest of some not returned. It was the better Opinion, that the Return was good; tho' some said the Sheriff may vary from the Return of the Bayliff, as he is one that makes the Array and is Judg also, 8 Rep. 157. Ed. Alsbams's Case.

Essement.

Estrepmēt.

The VVrit of Estrepmēt is a Prohibition
Where lies to do VVast and lies in two Points.

1. VVhen a Man having an Action depending (as a *Formedon*, VVrit of Right, &c.) sues to inhibit, the Tenant for making VVast during the the Suit, and this is either Original, and may be sued out of *Chancery*, or Judicial, granted out of the Court where the Plea dependeth, 2 *Inst.* 328, 329.

2. VVhen the Demand is to recover Seisin of the Land in Question, and before Execution sued by *Habere fac' Possessionem*, for fear VVast be made before her Possession, he Sues this VVrit. And a Man can recover Damages, for no more than is contained in his Count.

There is likewise, when fear is that Wast will be done to prevent it, a Prohibition directed to the Sheriff, not to permit Wast to be done. And the Form, *vid. 2 Inst.* 299.

The Sheriff may resist the committing of Wast, and may Imprison if he cannot otherwise hinder it, 3 *Bulst.* 199. And he may take the *Posse Comitatus* to hinder it.

*Posse comi-
tatus.*

In Wast *Estrepmēt* was awarded, and upon *Affidavit* that the Writ of *Estrepmēt* was delivered to the Sheriff, and that he gave notice to the Party, and yet he continues to make Wast; Attachment was awarded, 1 *Brownl.* 168.

Attach-
ment.

If the Tenants of the Land notwithstanding notice of a Writ of *Estrepmēt* directed to the Sheriff commit Wast; this is no Contempt, and the Court will not commit them, because it was
not

Contempt.

not immediately to them, as it might have been,
Hob. 85. Earl of Cumberland's Case.

Note, If the Sheriff be Plaintiff in the Action
of Wast, the Writ of *Estrepment* shall Issue to
the *Coroners*.

But this Writ of *Estrepment* is rarely used,
and in such cases, Injunctions out of *Chancery*
are frequently granted.

It seems *Estrepment* lies not in a Writ of Error,
of a Judgment in Partition, *Siderfin* 367.

*The Sheriff's Office in the Writ de Excommunicato.
Capiendo.*

The Sheriff needs not bring the Body into the
Kings Bench at the day of the Return, but shall
only Return the Writ thither with Declaration
briefly, in what manner he hath served and exe-
cuted the same, 5 *El.c.* 23.

If the Sheriff shall Return *non est Inventus*,
then a *Capias* shall be awarded with Proclamation
therein, commanding the Sheriff in the County
Court, or at the Assizes or Quarter Sessions, to
make open Proclamation ten days before the
Return at least, that the Party yeild his Body to
Prison in six days. And after the six days the
Sheriff, &c. shall make Return what he has
done thereupon, &c. (the Offender to forfeit 1 *ol.*
for such default) and so a *Capias* shall go *in-*
finite with like Proclamation: And a forfeiture
of 20 *l.* for every other default to be Estreated
presently, *Sat.* 5 *El.c.* 23.

If the Offender yield his Body, the Sheriff
shall presently commit him to Prison without
Bail.

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If the Sheriff make an untrue Return, that the Party has not yielded his Body on any Proclamation made, where indeed he has yielded, &c. he shall forfeit to the party grieved 40 l.

The Writ of *Excommunicat' Capiendo* must be taken out of *Chancery*, and recorded in the *Kings Bench* before it be delivered to the Sheriff, 1 *Reb.* 613. 5 *Eliz.* c. 23. *Lewes versus Stephen son.*

Neither a *V^o Laica removenda* nor *Excommunicat' Capiendo* were returnable before the Statute of 5 *El.* c. 23. 3 *Bulst.* 92.

He that is certified into the *Chancery* by the Bishop to be Excommunicated, and after is taken by Force of the Kings Writ of *Excommunicat' Capiendo* is not Bailable by the Sheriff, or Gaoler by the Kings Writ. But if the Party offered sufficient caution, *de parendo mandatis Ecclesie' in forma Juris*, then should the Party have the Kings Writ to the Bishop to accept his caution, and to cause him to be delivered. And if the Bishop will not send to the Sheriff to deliver him, then he shall have a Writ out of *Chancery* to the Sheriff to deliver him. Or if he be Excommunicated for a Temporal cause, or for a matter whereof the Ecclesiastical Court hath no consueance, he shall be delivered by the Kings Writ without any satisfaction, 2 *Inst.* 188; 189.

Return of Sheriff, as to Clerks.

Virtute istius brevis mibi direct' Justic' infra, script. certifico qd' infra nominat' T. H. Clericus est beneficiat' in Episcopatu London, nullum habens Laicum feodum in balliva mea ubi potest summon. nec est inventus in ead.

A. B. Armig' Vic'.

The

The Sheriff Returneth, That the Parson *ante adventum brevis*, or *post receptionem brevis*, or before the Return of his Writ had resigned his Benefice. *Et qd' non habet nec habuit bona neque catalla infra*, &c. Its a good Return.

In Trespafs or Debt against a Clark, *Nihil habet* is a good Return.

In Action brought against one wherein a *Capias* lies (*Ex gr. in account*) the Sheriff Returneth *qd. est Clericus Beneficiat. nullum habens Laicum feodum* in which he may be summoned; In this Case the Plaintiff cannot have a *Capias*, to take the Body of the person, but he shall have a Writ to the Bishop, to cause the person to come and appear. But if he had returned *qd' Clericus est nullum habens Laicum feodum*, then is a *Capias* to be granted to the Sheriff, because it appeared not by the Return that he had any Benefice, so as he might be warned by the Bishop his *Diocesan*, and no Man can be exempt from Justice. But in the Case of the King where he is party, the Sheriff cannot Return *Clericus Beneficiat' nullum habens Laicum feodum*, as on Distress for Issues lost on a Juror, 2 *Inst.* 4, 627.

If a *Scire fac'* be brought upon a Recognizance, or upon a Judgment in a Writ of Annuity, and the Sheriff Return, that the Defendant is *Clericus & Beneficiat' nullum habens Laicum feodum*, &c. the Plaintiff shall have a Writ to the Bishop to warn the Defendant, and upon warning, or two *Nihil*s returned, and default made, or if he appeareth and sheweth no matter wherefore Execution should not be granted, then a Writ shall be awarded to the Bishop to levy Execution *de bonis Ecclesiasticis*.

Retorn of a Writ of Entry.

The Count was of a third part of a Mesuage and one Stable. *Petit cape* was awarded to the Sheriff, and he makes his VVarrant to a Bayliff of a Liberty; he Retorns *quod cepit in manus Domini Regis* the said Mesuage, and saith nothing of the Stable: And for this cause Judgment was reversed, *Jones Rep. p. 357. Taite and Heynes.*

In a VVrit of Entry *sur Disseisin*, it was adjudged Error, because the Sheriff retorned not the Names of the Summoners or Veyors, *Cre. Eliz. 557. Merri's Case.*

Retorn of a Writ of Affize.

The Defendant pleaded to the VVrit of Affize, That the VVrit was retorned *coram nob' apud Westm'* not saying *ubicunque; sed non allocat.* The Court being here its well enough, and the Reason is, because it was for the Plaintiffs convenience that it was *ubicunque?* 2. It was *Summon' XII* without an *M. over.* VVhich *per Cur'* is well enough in Numeral Letters. 3. It was *qd' sint ibi Aud.* which should be *ad Audiendum*, as *Reg. 198. b.* But *per Cur.* This may be intended *Auditur'*, and so is well enough without *ad.* 4. It was *Si fec.* whereas it should be *Si fecerit. sed no allocat.* and a *Respondeas ouster* awarded, 3 *Keb. 326. Creek and Norfolk.*

Quare Impedit.

In a *Quare Impedit*, The Defendant must be Summoned by the Sheriff. And this Summons may be made in Church, or to the Parson; the Sheriff Returns *Nihil* upon the Summons, and upon the Attachment, and upon the Distress, the Plaintiff shall recover.

If the Defendant comes not at the Distress returned against him, the Plaintiff shall have a *Writ* to the Bishop, without making any Title, *Dyer* 241.

A *Writ* of Enquiry of value in a *Quare Impedit* was executed the first day of the Return, but the Jury did not give their Verdict till two days after.

Return of a *quid Juris Clamat*. *Vid. Dalton* c.71.

The Sheriffs behavior in the Writ and Inquisition, and Return of Malefactoribus in Parcis.

Vid. Cro. Car. 439 The King against the Inhabitants of *Epworth*, and 17 other Villages, and Statute *W. 2. c. 46. Co. Mag. Chart.*

C H A P. XXVIII.

Of Retorns of Clericus Beneficiat'. Of other Retorns as to Clerks. The Sheriff's Office in a Quare Impedit, Sessions of the Peace. The Sheriff's Office as to Election, and returning of Knights and Burgesses to the Parliament. The Form of Indenture for the Knights of the Parliament and Burgesses. The Sheriff's Return of the Writ for Electing Parliament Men.

Retorns of Clericus Beneficiat', &c.

AT the next County Court, after delivery of the Kings Writ to the Sheriff, for the Electing Parliament Men, Proclamation shall be made by the Sheriff in full County, of the day and place of Parliament, and all they who are present shall attend, and in full County proceed to the Election of their Knights for the same County; and after they are chosen, the Names of the persons chosen shall be written in an Indenture under the Seals of the Electors, and tacked to the said Writ of Parliament, *Stat. 7. H. 4 15.*

Upon any Return contrary to this Statute, of 8 H. 6. c. 7. the Sheriff shall forfeit 100 l. to the King, and have one years Imprisonment; and shall forfeit another 100 l. to the person chosen Knight of the Shire, and not duly Returned. The choiers must have 40 s. *per Annum* Freehold within the said County.

The choice must be between 8 and a 11 of Clock in the Forenoon.

Every

Every Sheriff, after receipt of the Kings Writ for Electing Knights of Parliament, ought forthwith to make out his Warrants under the Seal of his Office, to every Mayor and Baliff of Cities and Burroughs within the County; reciting in his said Warrants the Writ of Parliament, commanding them thereby to chuse Citizens and Burgesses to come to the Parliament (*scil*) if it be a City, to chuse Citizens for the same City by Citizens; and if it be a Burrough to chuse Burgesses by Burgesses (or Freemen of the same Burrough.) And those Mayors and Bayliffs must make a lawful Retorn of that Precept to the Sheriff by Indentures made between them and their Sheriff of their Election, and of their Names which are elected, 23 H. 6. 15. And the Sheriff must set his Hand and Seal of Office to one part of the Indentures, and then deliver it to them to be kept, and to the other part the Mayor, or Citizens, or Burgesses must set their Hands and Seals, and deliver it as their Deeds to the Sheriff, to be certified and returned by him with the Writ of Summons to the Clerk of the Crown; and all this under pain of 100 l. to the King, and Imprisonment for one year, and the Party grieved (or other person in his default) shall recover another 100 l. But they must commence their Action within 3 Months after the commencement of the Parliament, and Mayor and Bayliffs shall pay 40 l. *Dyer* 113. *Pl.* 118.

Note, Action on the Case lies against a Sheriff, for Retorning other Knights for the County than were elected, and it is against the Statute of 7 H. 4. for false Retorn, and 23 H. 6. c. gives Debt in the Case, and its not in the Negative, and so does not exclude from other Remedy, 2 *Siderfin* 168. *Nevile and Strowd.*

D d a

Now

Now the Names of the said Knights shall be Retorned into the *Chancery* by Indenture Sealed, between the Sheriff and the Chufers of the Knights in manner following.

The Form of the Indenture for the Knights of Parliament.

Hæc Indentura facta in pleno Comitatu Warr' sent' apud Burgum de Warr' de &c. Anno Wilhelmi Tertij, &c. inter A. B. Mil. Vic. Comitatus. præd. ex una parte & J. C. Mil. A. C. Armig. F. P. F. K. &c. & multas alias personas Comitatus. præd. & electores duorum Militum ad Parliamentum in Breui huic Indenturæ consut. specificat. ex altera parte qui ut major pars totius Communitatis præd. tunc ibid. existens Jurat. & examinat. secundum vim formam & effectum diversorum Statutorum inde edit' & provisor. Eligerunt. E. P. Mil. & J. C. Mil. infra Comitatu. præd. commorantes Gladiis cinet' milites habiles & magis idoneos & discret. dantes & concedentes prædict. duobus Milit. plenam & sufficientem potestatem pro se & tot. Communitat. Comitatus prædict. ad faciend. & consentiend. jûs que ad Parliamentum in dicto Breui content de Communi Consilio Regni dicti Domini Regis nunc Angliæ contingerit ordinari; super negotiis in dicto Breui spec. In cuius rei Testimonium uni parti bujus Indenture penultimo dictum Dominum Regem remanent. partes præd. sigilla sua apposerunt, aliter vero parti ejusdem Indenturæ præd. Vic. sigillum suum apposuit. Dat' die Anno & Loco supradict. &c.

*The Form of Indenture for the Citizens and
Burgesses.*

THis Indenture made, &c. (reciting the day and year, and the Kings Stile at Lage, *prout supra.*) Witnesseth, That by Vertue of a Warrant to me directed from Sir O. R. Knight, Sheriff of the County of *Warwick*, for the Electing and Chusing of two Burgesses, Men of good Understanding, Wit, Knowledge and Discretion, for Causes concerning the publick Wealth of the Realm, to be at his Majesties High Court of Parliament, to be holden at *Westminster*, the day of next coming. I E. L. Mayor of the Borough or Town of *Warwick*, with the whole assent and consent of the rest of the Burgesses there, have made choise and election of and of to be Burgesses of our said Borough of *Warwick*, to attend at the Parliament, according to the Tenor of the said Warrant to me directed in that behalf. In Witness whereof, I have to these Presents set our Common Seal of our said Borough, the day and year first above written.

The Sheriffs Retorn of the Writ, for Electing
a Parliament Man Knight of the Shire.

Virtute istius Brevis mibi direct Eligi feci duos
milites Gladiis cinctos magis idoneos & discret.
de Commisat. meo präd. (videl.) W.F. & O.S. qui
quidem milites plen. & sufficien. potestat. pro se &
Comunitat. Com. präd. habeant ad faciend. & con-
sentiend. iis quæ ad diem & locum infra content. de
Communi Consilio Regni Regis Angliæ ordinari con-
D d 4. ingerat

The Office and Duty of Sheriff, &c.

tingerit. Et præd. W. F. & J. S. Manucapt. sunt per J. P. W. B. R. D. & R. N. ad essend. ad Parliamentum Domini Regis apud Westm. ad diem infra content. ad faciend. prout istud Breve in se exigit & requirit Feci etiam præceptum (to the Mayor or Bayliff) de G. qd. de Burgo de G. Elegi fecerint. duos Burgenses de discret. & magis sufficien. qd. sint ad Parliamentum dicti Domini Regis ad diem infra content. ad faciend. & consentiend. ut præd. est qui quidem (Mayor, &c.) sic mihi respond. qd. Eligi fecer. de præd. W. Burgo de G. duos Burgenses discret. & magis sufficien. ad essend. ad Parliamentum præd. (viz.) S. W. C. R. W.

R. O. Armig. Vic.

The Sheriff's Office about the Sessions of the Peace.

As to the Precept of the Sheriff for Summoning the Sessions of the Peace, *vid. Lamb. 367. Impres. 1599.* it ought to bear date under the names of two Justices of Peace at least. And not of the *Custos Rotulorum* alone. It must be to Summon 24 Jurors, and to command all Constables, Bayliffs or Coroners, to give their attendance upon the Justices. And the Form of the Return of the Summons, *vide Dalt. 198.*

In some Cases the Sheriff is to joyn with the Justices as in Case of Riots, &c. *12 H.4. c.7.*

He is to attend and assist the Justices of the Peace, to Arrest such as shall make any forcqable Entries or Detainer, *15 R.2. c.1.*

He is to Summon 24 to be of the Grand Inquest.

As to other sorts of Precepts, which the Sheriff is to execute, in respect of Commissioners of Sewers, Commissioners of Bankrupts, and several other Acts of Parliament, *vid. Dalton.*

And

And the Acts themselves, all the Duties of his Office being so various, and especially in many late Acts, its best to refer to the Acts themselves, which no Gentleman ought to be without.

G H A P. XXIX.

Customs of London. Of their Officer, Prison, Court of the Sheriffs Court. How to lay the Custom of the Sheriffs Court. The difference between the Mayors Court and the Sheriffs Court. Sheriffs Court when kept. The manner of entering Actions in the Country.

Customs of London, as to Officers, Courts, Process and Prisons, &c.

Vide 9 Rep. 62, 63, 67. tit. Arrest, & vid. Calibrop.

BOth the Sheriffs of London are in Law but one Sheriff, and the one is not of London and the other of Middlesex, as is vulgarly supposed, *Hob. p. 70, Lamb and Wiseman.*

And the Sheriff of London is known in Law to be two persons; therefore if one Sheriff of London make his Retorn without his Fellow this cannot be holpen by *Jeofail*, it being as no Retorn at all, or a Retorn without the Sheriffs Name subscribed: And London had no Sheriffs in the 13th of Ed. 1. 1 Leon. 284.

In London the Mayor and Comminalty have the Office of Sheriff of London and Middlesex, and Two Sheriffs are yearly cholen, 3 Rep. *Westby's Case.*

Upon

The Office and Duty of Sheriffs, &c.

Newgate
a Prison
for both
London
and *Mid-*
dlesex.

Commit-
ment by
Sheriff of
Middlesex,
is not a
Commit-
ment
in *London*,
tho' the
Sheriffs of
London and
Middlesex
are one.

Upon a *Capias ad satisfaciendum* to the Sheriff of *Middlesex*, to take *J. S.* if the Sheriff take him and put him in *Newgate*, which is the Common Prison for *London* and *Middlesex*, and after another Writ of *Execution* comes to the Sheriff of *London*; altho' the Sheriffs of *London* are also Sheriffs of *Middlesex*, and *Newgate* (where the Prison is) is the Prison for both Counties; yet the Prisoner shall not be said to be in Execution upon this New Writ in *London*, nor may the Sheriff of *London* serve it upon him, because he is in another County.

For when the Commitment is to *Newgate* by force of a Writ to the Sheriff of *Middlesex*, he may not be said in any respect to be in the County of *London*; for the Counties continue several, and the Prison several, in respect of the several Commitments: For there are two several sides, and a partition between them, 1 *Rel. Abr.* 894. *Coas's Case*, *Trin.* 16 *Jac. B.R.*

By the Custom of *London*, the Writ of *Execution* is directed to the Sheriffs of *London*, and not to the Coroner, (who is the Mayor, 2 *Rel. Abr.* 806.

The Return of the Outlawry out of *London* in C. B. is generally made without saying, *Per judicium Coronatorum*.

Sheriffs Courts.

Court of
Conscience

The Custom is, When a man is impleaded before the Sheriffs, the Mayor upon suggestion of the Defendant may send for the parties, and for the Record, and Examine the parties upon their Pleas; and if it be found upon his Examination that the party Plaintiff is satisfied, that he

he may award that the Plaintiff shall be barred. And this is called, *The Court of Conscience*, 4 *Inst.* c. 50. 8 *Rep.* City of London's Case.

The Plaintiff in Assault and Battery in his Replication saith, 'The City of London is an Ancient City, and have Pleas, and that there was a Plaint in such a Court before *F. M.* by virtue of which Process the Plaintiff was taken. He should have alledged a Custom to hold a Court before the Sheriffs, and that *F. M.* was then Sheriff: It is said, *Coram F. M. uno Vicecom*, its well enough, there being two Courts, tho but one Sheriff, 1 *Keb.* 564. *Osborn and Parker.*

How to Lay the Custom of the Sheriffs Court.

As to the difference between the Sheriffs Court, and Mayors Court.

A Clerk of the Mayor's Court said, That the Figures 264 (in their Entries) signifie the 26th day of the 4th Month, 26 the Day and 4 the Month, accounting November (in which the Mayor is Chosen) the first, and so the fourth Month is February.

Difference of the Entries in the Mayors Court, and the Sheriffs Court.

But in the Sheriff's Court they count their Months in October.

And accordingly it was Ordered, That *Ashfeld* the 20th day of February commenced a Plaint, &c. 2 *Roll. Rep.* 380. *Ashfeld's Case.*

If an Erroneous Judgment be given in any of the Sheriff's Courts of the City of London, the Writ of Error to Reverse this Judgment must be brought in the Court of the *Hustings* before the Lord Mayor; for that is the Superiour Court, *Pract. Reg.* 124. 4 *Inst.* 247.

Writ of Error to be brought in the Hustings.

Direction of Writs.

*Quodlibet breve quod tangit liberum tenementum
dirigitur Majori & Vicecomitibus, & alia breviam
tantum Vicecomitibus.*

Sheriffs
Courts,
when kept.

The Two Sheriffs of *London* do each of them keep a Court of Record, where they hold Plea of all Personal Actions, and the two Prisons (called the *Compters*) belong to them.

And they have two Court-Days in every Week apiece: For the *Woodstreet-Compter*, on Wednesdays and Fridays; for the *Poultry-Compter*, on Thursdays and Saturdays.

In a Plaint of Debt levied before any of the Sheriffs, the Custom is, That the said Sheriffs *Ore tenus* send to the Serjeants of the Compter, either to Summon or Attach the Defendant without Warrant; and upon *Nihil* Returned within the City, that then the Serjeants, and every of them, by the Commandment of the Sheriff have used to Attach and Arrest the Defendant, to have his Body at the next Court before the Sheriff at the *Guild-Hall, &c.*

In this manner they certify their Records: But the usual practice is, to Enter an Action in the Office for that purpose, at one of the *Compters*; which Action must be Entred with Care: For it is the Original in that Court by which you must Declare, and from whence there must be no Variance.

Of Entering
Actions in
Compters.

Bail.

And when an Action is Entred, then any one of the *Serjeants* may Arrest the Defendant, and bring him into Custody until he find Bail to Answer the Condemnation, which Bail is to be taken by one of the Clerk-fitters.

The

The Defendant may be Arrested by the Custom of *London*, after Entry of the Plaintiff in the Porters-Book, before the Entry of it in Court before the Sheriff: And after Plaintiff Entred, the Serjeant may Arrest without Precept.

The Serjeant need not shew his Mace, because he is sworn and known, altho' not to the party; and a known Bayliff need not shew his Warrant, altho' demanded.

But in 6 Rep. 52. *Countess of Rutland's Case*, a General Arrest by a Serjeant by shewing the Mace, and touching his Body with it, and saying *Sir, I Arrest you*, is insufficient; for he ought to shew at whose Suit, out of what Court, for what, and of what Return, &c. That the party may know, &c.

In Escape the Defendant pleads the Custom of *London*, That the Mayor and Sheriffs of *London* have used to enlarge Prisoners that were Arrested, in coming and returning from their Courts, having Causes there depending; and sets forth a Plaintiff in *London* against the Defendant, and that he was arrested, and appeared, and pleaded to that Action, he was arrested, as is supposed in the Declaration. And *per Cur.* the Court cannot discharge one arrested, except he be arrested in the Face of the Court, *1 Brownl. 15. Wilson and The Sheriffs of London.*

Serjeant shewing his Mace;



Whether the Court can discharge one arrested, who is coming and returning to the Court.

C H A P. XXX.

The Sheriffs Duty as to the Assizes. And as to Sessions of the Peace.

The Form of the Warrant made by the Sheriff, or Undersheriff for Summoning the Assizes, *vide Dalton* 196. A Schedule may be Filed to the backside of the Warrant; wherein he shall set down the names of the Grand Jury and Petty Jury of Life and Death; to whom he must give warning by his Bayliff.

The High Sheriffs themselves are to attend the Judges at the Assizes: And also Stewards Bayliffs, and other Ministers of any Liberties or Franchises, &c. shall be attendant to the Justices of Assize and Gaol Delivery of the same Counties, wherein such Liberties and Franchises shall be. And shall be fined by the Judges in case of failure.

Every Sheriff (and all other persons) which have the Custody of the Gaols (or Prisoners for Felony) ought to certify the names of every of their Prisoners, which are in their Custody for Felony, to the Justices of the next Gaol Delivery, upon pain of 5 *l.* for every default.

C H A P. XXXI.

Of Sheriffs and Officers Fees. Remedy and Security for Fees. Extortion Punishable. What Assumpsit good, as to paying Fees, or not.

Of Sheriffs and Officers Fee.

AT Common Law a Sheriff might not take any Fees, but it was Extortion: But now he may take the Fees allowed by the Statute, *Cro. El. p. 654. Stanton and Sullyard.*

The Statute is 29 *El. c. 4. No Sheriff, Under-Sheriff, Bayliff of a Liberty, or any of their Deputies shall either directly or indirectly, take more for serving an Extent or Execution, than after the Rate of 12 d. in the Pound for every 10 l. and 6 d. for every Pound above 100 l. on pain so forfeit treble Damages to the party grieved; and besides, 40 l. between the Queen and the Prosecutor. This Act not to extend to Fees of Executions within Cities or Corporations.* *Stat. 29 El. c. 4. of 12 d. in the Pound.*

Yet the Sheriff, by the Equity of *Stat. 23 H. 6. c. 10.* he shall take 4 d. for every Warrant, *Winch. 21.*

Upon the words of this Statute it was a Question much Argued in *Latch. 17. 51. Welden and Vesey, Jones 307. Lister and Bromley, Cro. El. 335. Gurney's Case, Cro. Car. 286. Lister's Case, Winch. p. 21, 50. Empson's Case*, where the Statute gives 12 d. in the Pound for the first 100 l. and if exceeds that, then but 6 d. Whether this shall be taken, but only 6 d. in the Pound for all that exceeds 100 l. or whether he shall have 12 d. for the first 100 l. and Six pence for the rest?

And

The Office and Duty of Sheriffs, &c.

And it was Adjudged that he shall have 12 *d.* for every Pound of the first Hundred, and 6 *d.* for every other Pound above the Hundred: And so is the constant practice. Tho' *Hobart* (in *Winch. 50. Empson's Case*) was strong against it, and that the Sheriff shall have but 6 *d.* in the Pound.

As to the Proviso, *That it shall not extend to Executions within Cities or Corporations*, it was held, That it was only to be intended for the executing Judgments given in the Courts of the said Corporation, and not to the Sheriffs of Cities or Corporations, for executing Judgments out of Superiour Courts, *Jesson. Sheriff of Coventry's Case*, cited in *Lister and Bremley, Cro. Car. 287.*

Vide Latch. 17, 52. Poph. 173. Welden and Vesey,
The Case Argued.

Stat. 29 El.
when be-
gan.

In an Action upon this Statute of 29 *Eliz.* against the Sheriff for excessive Fees, it was moved in Arrest of Judgment, because it said *ad Parliament' sent' per prorogac'* 15 Febr. 29 El. and the Rolls appeared (by Copy sworn) 29 Oct. 28 *Eliz.* the Parliament began, and an Adjournment to 17 Nov. 6. and no Prorogation at all.

So 35 *El. 1. Sess. 11.* it said 29 *El. 6.*

Vide 1 Anders. 294. Raft. Abr. Elenchus Parliam.
& Keb. 3. 742. Sprig and Eve.

Quere, When one Sheriff shall make the *Ex-sent*, and the other Sheriff the *Liberate*, who shall have the Fees given by the Statute.

Note;

Note, The Fees shall be paid by him that sets him at work, and not by the Prisoner. Of whom the Bayliff on Arrest having taken 7 s. for Attorneys Fees, was convicted of Extortion, 1 Keb. 623. *Le Roy versus Wade*.

Poundage was allowed the Sheriff out of 100 l. (Fine imposed after Conviction on Indictment of Battery in B. R.) levied upon a *Fieri fac*; and it was allowed out of the Money, in the hands of the Clerk of the Crown payed by the Sheriff. Tho' there was no President in B. R. for it. But the Barons always make such allowance in the *Exchequer*, after the Moneys paid in there by the Clerk of the Crown, *Sir Thomas Jones* 185. *Le Roy versus Wade*.

Of Sheriffs Security and Remedy for Fees, and what Fees they may take or not, and what shall be Extortion in them or not, and how punishable.

What Security the Sheriff may take for his Fees or not.

The VVarden of the Fleet, and the VVarden of the Palace of Westminster, may take Bond for Diet and due Fees of the Office, *Hetly* 176. *Harris and Lea*.

The Sheriff may take a single Bill for his Fees, and that is the ordinary course, but not with a Penalty. To this purpose there is a notable Case, *Empson and Bathurst*, *Winch* 22.

The Sheriff shall take single Bill, for his Fees but not with a penalty.

The Office and Duty of Sheriffs, &c.

The Condition of a Bond to the Sheriff is to pay 20*l*. That is, for Money which is given to him for his Fees, which are due by the Stat. of 29 *Eliz.* Defendant pleads the Statute of 23 *H. 6. c. 10.* the Case was; A Statute of 200 *l* was acknowledged to the Defendant by *J. S.* and this was extended by the Plaintiff being Under-sheriff, and it was agreed between *C. E.* Brother to the Plaintiff, and the Under-sheriff before the *Libertate* executed, That the Defendant should enter into the said Bond to the use of the Plaintiff. Three Points were resolved *per Curiam.*

Statute 23
H. 6.

1. This Bond is not within the Statute of 23 *H. 6.* for the Party was not within the Ward of the Sheriff. And so was *Beaufage's Case.*

Action is
by Sheriff.

2. The Sheriff may not take his Salary appointed by the Statute till a compleat Execution, *i. e.* till the *Libertate*, for the words of the Statute are in the Negative, and doth not establish the Fees, but only tolerates them. And by *Hobart*, if the Conisee sue an Extent, and then refuse to sue the *Liberate*, to the intent to defraud the Sheriff of his Fees; the Sheriff shall have his remedy by Action on the Case.

3. This Obligation is void by the Common Law, and Extortion, as *Dive and Manningham Case* is, *Plowd. 65.* The Sheriff may take a Bond with a great Penalty, for the appearance of the Party, but not for his Fees, by the 23 of *H. 6.* for that Statute as to Fees is not repealed by 29 *Eliz.*

What

What Remedy the Sheriff shall have for his Fees.

Action of Debt lies for a Sheriff upon the Statute of 29 *Eliz. c. 4.* for Execution Fees, altho' the Statute doth not say he shall have the Fees, nor any Action for them; but only saith, he shall not take for any Execution made, any Consideration or Recompence, besides what is therein mentioned, which it shall be lawful for him to take (*viz.*) 12 *d.* for 20 *s.* where the Sum doth not exceed 100 *l.* and 6 *d.* above 100 *l.* 1 *Rolls Abr.* 598 *Proby and Lumly versus Mitchel*; 1 *Rolls Rep.* 404.

The Sheriff shall have Action on the Case, but not debt upon *Assumpsit*, to pay his Fees due by the Law of the Realm, for to execute an Execution. *Moor* 699. But he shall have Debt for his Fees not prohibited by the Statute of 29 *Eliz.* *Moor* 853. *Staunton and Proby*, *Moor* 667. *Mor.* 667. *Sullyard and Stamp.*

Where and in what Actions the Sheriff shall not take Fees.

The giving of Money to a Sheriff to Arrest a Man is against the Law, 1 *Rolls Rep.* 312.

A Sheriff cannot take Money for Fees upon delivery of Warrants to his own Bayliff, but must stay till the Money is levied, *aliter* if it be to Special Bayliff, *Moor* p. 468. *v.* 669. *Sullyard and Stamp.*

No Fee is due to the Sheriff for Executing a *Cap. Utlag.* *Cap. Utlegat.* either for VVarrant to Execute it, or for the Return of it. Sheriff took 200 *l.* to

*Hab' fac.
Possession'.*

Execute *Hab. fac. Possessionem*, *Hetly p. 52. Wild-sheres Case, Litt. Rep. 65. Mesme Case.*

Per Cur' Its great oppression to the Subjects, that the Sheriffs (to whom the Statute had given so much in the Pound, in Case of Execution against a personal Estate) should take such Fees in case of a real Estate; and it was said, it was not to be found that they have any legal Fee upon this Execution, but the usual Fee which they ought to take is 2 s. 4 d. 2 *Siderfin* 155.

What shall be said Extortion in Sheriffs and Gaolers, &c. and how punishable.

As to the Sheriffs taking Bonds, *Extorsivè*, *Vid. supra in tit. Stat. 23 H. 6. c. 10.*

By *W. 1. c. 26.* no Sheriff or any Minister of the King, shall take any reward for doing his Office, but only that which the King allows, upon pain that he shall render double to the Party, &c. but later Statutes have permitted them to take, in some Cases. But yet, such reasonable Fees as have been allowed by Courts of Justice of old to inferior Ministers and Attendants on Courts, if they be demanded, its no Extortion, *Co. 1 Inst. 368. Shirly and Packer. 10 Rep. 101.*

If any Bayliff or other Sheriffs Officer, shall take any thing of any person, to spare them for appearing at the Assizes, Sessions of the Peace or the like, it is Extortion.

If the Sheriff, or any of his Officers shall take any Money, or other reward for the omitting of any Arrest or Attachment to be made; it is Extortion, and the Sheriff or Officer so offending, shall forfeit for every such offence 10 l. to the King and Informer, *32 H. 6. c. 10.*

As to the Punishment of Sheriffs for Extortion, its either by *Indictment*, *Information*, *Imprisonment*, *Commitment*. As to *Indictments*, what is good or not.

Indictment of Extortion against a Bayliff of *Indictment*, an Hundred, *qd' Colore Officij* he took *Extorsive* Money, and shews not for what matter or cause. *Per Curiam*, Its well enough, the Officer being Bayliff of an Hundred, Especially being after a Verdict. But *Quere* of this, 1 *Keb.* 557. *the King and Gover.*

By 23 *H. 6. c. 20.* on Extortion treble Damages are given to the Party, and the Justices of Peace may Assess them; but they ought first to enquire of the Damages by a Jury. Therefore in *Bumpsteads Case*, *Cro. Car.* 488. *Indictment* was against the Sheriff for Extortious Fees, on two several *Indictments*; They awarded to the one treble Damages; That is, where he took of one 20 *l.* *Extorsive*, they awarded to the Party 3 *l.* and 40 *l.* to the King. And on the other where it was found he took 8 *s.* 8 *d.* *Extorsive*, they awarded he should pay to the Party 26 *s.* 8 *d.* So a quadruple value, and 20 Fine to the King. And it was adjudged Error, *causa qua supra*.

The *Indictment* must be *contra formam Statuti*, *Contra formam Stat.* if they will proceed upon the Statute of 23 *H. 6. id.* *ibid.* The Court were doubtful, if this Statute 23 *H. 6.* extends to Extortions, unless taken upon Arrest. And Judgment was reversed.

The Sheriffs Bayliffs were indicted at the *Indictment* Quarter Sessions for Extortion, *Jones* 379. *The at Quarter Sessions.* *King against Lamfern.*

An Informer on Conviction of a Prisoner for Extortion, or other Penal Law, may have the third part of the Fine, according to the Kings privy Seal for that purpose. And he had so of 10 *l.* set on a Bayliff for 3 *l.* taken for Ex-

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cution done to his person, 1 *Keb.* 357. and *pag.* 487.

Information was brought against the Keeper of the Gaol, or Prison of the Castle of *Maidstone*, for Extortion on the Statute of 23 *H.* 8. And it was found by Special Verdict, that there is not any Castle at *Maidstone* but a Gaol, and the Defendant was Gaoler there. *Per Curiam*, Judgment *pro Querente*, 2 *Rolls Abr.* 211. *Goodwin and May.*

In 2 *Brownl.* 283. The Sheriff was committed to the *Fleet* for taking Illegal Fees, 2 *Brownl.* 283.

Commitment for taking illegal Fees.
Mitigation of Fine.

A Serjeant of *London* was committed in Execution for a Fine in Extorting Fees on an Arrest, and a third part was allotted to the Prosecutor. His Wife petitioned the Court to mitigate the Fine, but they could not, 3 *Keb.* 328. *the King and VVelson.*

The Sheriff of *Suffolk* was imprisoned for taking a *Guinea*, there being only 2 *s.* due to him, and he returned two *Guineas* to the Plaintiff, being double of what he had taken, on the 3 *Ed.* 1. *cap.* 26, and so he was discharged, 3 *Keb.* 714. *Butlers Case.*

Assumpsit and Consideration about paying Fees, what shall be good or not.

If a Man assume for Money given to serve certain *Process*s, this is not a good consideration, as being against Law. For it is Extortion in the Sheriff to take it, and unlawful for the other to give it, *H.* 10. *Jac.* *Boothby and Alport*, 1 *Rolls Abr.* 16. *Shirley and Parker.* *Ergo.* *Cro. El.* 654. is not Law, *Stamp and Sullyard.* Executor Sues Execution by *Elgis*, and *B.* an *Esstranger* as a friend

to the Executor, in consideration that the Sheriff will Execute the said *Elegit* presently, and of 6 *d.* paid him by the Sheriff assumes to pay 60 *l.* to him; whereupon the Sheriff Executes the *VVrit*. This Consideration is against Law; for the Sheriff ought to do his Duty without reward; and this 60 *l.* is not any discharge of Sheriffs Fees, due by the Statute being given by a Stranger, and not exprest for them, 1 *Roll. Ab.* By a Strar^r 16. *Bird and Cage*, and tho' it was alledged, that ^{gr.} this Sum promised him is no more than what the Statute of 29 *Eliz.* allows him to take for his Fees; yet that helps not the Case, for that Statute only excuseth him for his taking Fees, whereas the Common Law did not permit him to take any thing for the executing *VVrits*. And the giving of 6 *d.* is no sufficient Consideration being joyned with the other that is unlawful, *Gro. Jac.* 103. *Mesme Case*.

A. is Outlaw'd at the Suit of *B.* for Debt, and *B.* Assumes in Consideration, that *C.* an Estranger will Arrest *A.* upon a *Cap. Utlag*, that he will pay him 40 *s.* This is no good Consideration, altho' he shews in his Declaration that he was after made a Special Bayliff to the Sheriff, to Arrest him by a *VVarrant* directed to him. ^{In consideration that C. an Estranger will arrest a Man.} This is Extortion, and the Sheriff by such means may extort great sums for doing his Office: And the Bayliff is the Officer of the Sheriff and his Servant, 1 *Roll. Abr. ib.* *Faldae and Salter. Jones* 65. *Mesme Case*, *Latch* 54. *Mesme Case*. But if a Promise be made to a meer Stranger to go to the Sheriff, and procure him to Arrest *S. J.* this is a good Consideration; so if one pray me to go with the Sheriff to Assist him, in making Execution, and Promiseth me, &c. its good. ^{Promise to a Stranger to procure the Sheriff to arrest J. S. is good.}

C H A P. XXXII.

Bonds, or Covenant between the High-sheriff and Under-sheriff, or other Officers. What shall be good in Law, or not: And when said to be forfeited, or not.

Bonds, Covenants, &c.

Difference
between a
Covenant
and a
Bond.

IF the Under-sheriff Covenant with his High-sheriff, to save him harmless from all Fines and Amerciaments for any Escape; and Covenants also, That he will not execute any Writ of Execution above the Sum of 20 l. without Warrant from the High-sheriff: This last Covenant is against Law, and void; yet, the other is good, (but a Bond in such case is void in all.) For by the Statute of 27 Eliz. c. 12. the Under-sheriff takes Oath to execute all Process, *Hob. 15. Norton and Sims, 2 Roll. Abridgm. 30. mesme Case.*

Vide supra tit. Under-sheriff.

To save
Sheriff
harmless
from
Escapes.

Escape on
Cap. Utlag.

being
void, be-
cause
Returned
10 years
after, it
was
awarded.

The Keeper of *Ludgate* gives Bond to the Sheriffs of *London*, That he should safely-keep the Prisoners committed to his Charge, and should save the Sheriff harmless from all Escapes. The Bond is good. (*Quære* as to the last part.) *Cro. El. 466. Hector and Gennet.*

But it is not forfeited by Escape of one taken by a *Capias Utlagat'* in Debt; because the *Capias Utlagat'* was awarded the 25th of *Eliz.* and was Returnable the 35th of *Eliz.* and so merely void. For every *Capias* ought to be Returnable the ensuing Term; because of the mischief that otherwise might befall the Prisoner to be kept always

always in Prison, and he might well let him at Large, 21 H. 7. 16. 8 Ed. 4. 4. Dyer 175.

Tho' peradventure this Arrest, by force of this Process, is excusable in False Imprisonment by the Sheriff, yet clearly its no lawful Imprisonment; and as to the prejudice or benefit of a Stranger, he shall never be said to be a Prisoner, 14 H. 8. 16. 11 H. 4. 36.

Debt on Bond to perform Covenants; which was, That the Defendant should not let at Large any Prisoner arrested, without the Sheriffs Warrant. The Plaintiff shews, the Defendant had let such a Prisoner at Large at *Westminster, &c.* it is good without shewing the time and place of the Arrest. For the Escape is the Material part of the Covenant, and the manner of the Arrest is not in Question, and whether he were legally taken or imprisoned, was not material, when he was suffered to go at Large, *Siderfin* p. 30. *Jenkin's Case.*

The Condition of the Bond was, Whereas *S.* was Sheriff of *Surrey*, and made *T.* Bayliff of the Hundred of *B.* Now if he should execute his Office, &c. and make true Return of all Writs directed to him, then, &c. Defendant pleads on Oyer particularly, performance to all. Plaintiff Replies, Process was directed to him, to levy Issues on *J. S.* and that he made his Warrant to *T.* to Execute the same, which Warrant he did not Return.

On Demurrer, Judgment was against the Plaintiff; because he did not shew that the Issues were to be Levied in the Hundred of *B.* For tho' the words are general, to make Return of all Warrants directed to him, yet it was to be understood of such only as were to be Executed in

in his own Hundred, of which he was Bayliff, *Allen p. 15. Slaughter and Day, 2 Sand. 414, 415. mesme Case cited there.*

To pay
the Ex-
pence of
the High-
sheriff.

Debt on Bond by Under-sheriff, to defray the Expence of the High-sheriff; and Performance pleaded. Plaintiff Replies, *J. S.* recovered in Charges in carrying the Prisoner from *Chelmsford* to *London*, not shewing it was done by virtue of *Habeas corpus*. Defendant Rejoyns, This was by private Agreement. Plaintiff Demurs, because it was not Concluded to the Country. *Per Cur^o*, There must be a Compulsion shewed by *Habeas corpus* to the Sheriff of *Essex*, without which he cannot deliver him over to another Sheriff; and then there is an Allowance upon the Account in the *Exchequer*, in case of Transporting, being Signed by the Judges. And the Court gave leave to Discontinue, *3 Keb. 448 Lewen and Allcock.*

As to the Form of the Indentures and Covenants between the High-sheriff and Under-sheriff, *vide Dalton, Greenwood of Courts*, and several other President Books.

C H A P. XXXIII.

Of Sheriffs Accompts.

AS for the Periods of Time wherein the manner of the Sheriffs Accompting to the King have been altered by Acts of Parliament and Practice, you may peruse a Learned Treatise of the late Lord Chief Justice *Hales* touching Sheriffs Accompts. You find there how the King's Farms were anciently Answered by the Sheriffs, and the manner of the Collecting of the Kings Revenues of the County.

Now that which was *Firmi Comitatus*, were the *Vicomtiel Rents*, and they came under various denominations, (*viz.*) *Blanch-Rents*, *Albo firmæ Præstatio pro pulchrè placitando*, *Visus Frankpledg*, *Redditus ad Turnum*, *Certum Letæ*; and these were in time contracted to a sort of Annual Revenues.

And the uncertain Annual Revenue was called *Proscuum Comitatus*, which in ancient Times was considerable, when most Law-Suits were Transacted in Counties and in Hundred Courts, Fines, Issues and Amerciaments in those Courts; and in those elder Times they were considerable.

The Farm of the Bailywick of one County was let at 100 *l.* per *Annus temp. H. 3.* but by *Stat. 27 H. 6. c. 10.* the Sheriff is restrained from Letting his Bailywick to Farm.

But these were formerly, and now are answered at two Terms in the year, *Michaelmas* and *Easter*, and are called *proferæ Vicecomitis*, or Sheriffs proffers. But it is as it were a Mock-payment

The Office and Duty of Sheriffs, &c.

payment (now being so inconsiderable, most Causes being tryed in Superiour Courts) for upon Account he generally has all his Proffers paid and allowed to him again.

Vide the Statute of 4 H. 5. 2. & 34 H. 8. c. 16.

Since the Statute of 34 H. 8. c. 16. the Sheriffs might discharge themselves of the Casual Charges, or Annual uncertain Charges, and most ordinarily after this Statute did discharge themselves of the entire *Firma de proficuis Comitatus*; and they ascertained to the Court, that there were no such profits beyond the charge in collecting them, or that the charge of keeping the County Court, the Tourn and Hundred Courts, which were the things that made up the *Firma de proficuis* surmounted the benefit: And this Making appear, was no other than the Oath of the Sheriff, and the Statute gives him that benefit.

Yet tho' the Sheriffs did use to discharge themselves by their Oaths of the entire *Firma de proficuis Comitatus*, and of a great part of the *Viscountiels*; yet till *Anno Dom. 1650.* these entire Farms were constantly written out in Charge to the Sheriff upon the Summons of the Pipe, tho' it was but a piece of Formality.

But now the *Firma de proficuo Comitatus* is wholly put out of the Charge of the summons of the Pipe, by an Order made in the *Exchequer 1650.* which is followed to this day.

By the Act in Car. 2. Entituled, *An Act for the preventing the unnecessary delays of Sheriffs in passing their Accounts.* No Sheriff shall be charged in Account to answer any illeivable Seifure, Farm, Rent or Debt, or other thing, which was not writ in Process to him or them to be levied, wherein

wherein the persons of whom, or the Lands or Tenements out of which, together with the Cause for which the same shall be so levied, shall be plainly and particularly expressed; but shall be thereof wholly discharged, without Petition, Plea, or other trouble or charge whatsoever.

If the Sheriff shall seise the Goods of one that is Outlawed, &c. and does not accompt for the same, the Owner of the Goods may have Action of *Trespass* upon such Seisure; and shall recover the Goods, or the value thereof in Damages. For the Sheriff must plead that he has accounted for them; otherwise he shall be a Trespassor *ab initio*.

Note, The Sheriff is Accountable in respect of his Office; but if he be made *sine Computo*, he has by this the Profits to his own use, 1 *Roll. Rep.* 183.

O.N. in the *Exchequer* makes the Sheriff Debtor to the King, and the Debtor himself Debtor to the Sheriff, *Hob. 206. Speake and Richard's Case.*

C H A P. XXXIV.

Of Coroners. How the Coroners must be chosen, and the Credit the Law gives to them; and how when they shall be discharged. The Demeanours as to Outlawries. Coroners Inquest.

Of Coroners, &c.

4 Rep. 41. **T**HE Office of Coroner ever was, and yet is
 Heydon. Eligible in full County by the Freeholders;
 8 Rep. 41. by the Kings Writ *De Coronatore Eligendo*. And so
 Gremly's was the Sheriff in former times Eligible, and the
 Case. Sheriff was chosen by Writ directed to the Cor-
 5 Rep. oners.
 Specor's
 Case.

4 Rep. 45. The Coroner, because he is Elected by the
 Wrote's Freeholders of the County by Writ, and return-
 Case. ed of Record in the Chancery, albeit the King
 9 Rep. 31. dieth, remaineth.

Strat. Mar. Now seeing the Coroners are Elected by the
 5 Rep. 108. County, if they be insufficient and not able to
 de Wreck. answer such Fines and other Duties, in respect
 10 Rep. of their Office, the Country as their Superiour
 Denband. shall answer for the same.

St. 28 Ed. 3. If a *Certiorari* be directed to the Sheriff only
 c. 6. Elect. of Coroners. in case of Appeal, or Indictment of Death, it is
 Vid. 4 Inst. not sufficient to remove the Cause; for the Co-
 271. Mag. roner is Judge of the Cause, and not the Sheriff;
 Ch. 17. cap. roner is Judge of the Cause, and not the Sheriff;
 W. 1. c. 10. only the Sheriffs have Counter Rolls with the
 Artic. Super Coroners.
 Chart. c. 3.

3 H. 7. c. 1. gives to the Coroner a Fee of 13 s.
 4 d. upon the View of the Body, and of the
 Goods of the Murderers: But nothing on Mil-
 adventure, 1 H. 8. c. 7. & W. 1. c. 10.

Coroner

Coroner is an Officer for the King; but he is not an Officer when he comes between the parties; and the Court will not ſuffer Examination, when the Teſtimony may be *viſd voce*, 2. *Roll. Rep.* 461.

Altho' the Coroner takes Examination, yet in the Caſe of the King it is at the diſcretion of the Judges, if he will allow them or take them *viſd voce*, 2. *Roll. Rep. ibid.*

Before the Stat' *Artic ſuper Cler.* 3. the Coroner of the Verge by himſelf might Enquire of Murder: But becauſe the King's Court often removed into another County, by reaſon whereof no Enquiry could be made, that Statute was made to remedy it, and one perſon may be Coroner of the King's Houſhold and Coroner of the County; and yet they are two Coroners, &c. *Quando duo jura concurrunt, &c.* 2. *Leon. p.* 160. *Borow and Holcroft.*

*Where Proceſſ ſhall be awarded to the Coroners,
or not.*

When the Sheriff is Plaintiff in Action of Waſte, Election ſhall go to the Coroners, *Hob.* 85.

Vide Plowd. Wimbith. and Willoughby.

*Where Writs ſhall be directed to the Coroners, and
where not.*

A Sheriff's Bond for Appearance is ſued; the Writ upon it ought to be directed to the Coroner, becauſe the Bond is to be ſued in the Sheriff's Name, *Pract. Reg.*

Upon

The Office and Duty of Sheriffs, &c.

Upon a *Venire fac'* awarded to Coroners, and two Coroners Retorn this, and two Coroners Retorn the *Distingas*, where at the time of the Retorn there were four Coroners; this is not good, because all the Coroners ought to make the Retorn and joyn in it, they being Ministers and not Judges, *Hob. Rep. Lamb and Wiefman.*

This Case is Reported by *Cro. Jac.* 383. (in the *Exchequer-Chamber.*) The *Venire fac'* being awarded to the Coroners, was Retorned by *T. B.* and *T. R.* Coroners; whereas at the time of the Writ awarded and retorned there were two other Coroners, (*viz.*) *VV. S.* and *T. P.* and the Retorn ought to have been in the Name of the four Coroners.

Per Cur. It's not Error.

1. Because it ought to have been taken by way of Challenge at the time of the Trial; and forasmuch as he hath not challenged it, he shall not now assign it for Error.

2. Admitting it were Error assignable at Common Law, yet now (being after Verdict) is aided by the *Statute*, which aids MisRetorns and Insufficient Retorns, and this is but a MisRetorn.

Upon the *Venire fac.* Retorned by Coroners, their Names were writ *A. & B. Coronatores*, and upon the *Hab' corpora* the Names of *A.* and *B.* were written, but not the Name of Coroners. *Per Cur.* It's no Error: But if their Names ought to have been here, then it is not aided *per Stat.* 32 H. 8. nor 18 Eliz. *Cro. Eliz.* 703. *Scruggs's Case.*

Where a Jury is Retorned by a Coroner, where it ought to be by the Sheriff, & *à converso*, this is not redressed by the *Statute Anno* 32 H. 8. 18 Eliz. (*Vide the late Stat.*)

Writ

Writ of Covenant was directed to the Coroners of Chester, with a claim at the end of the Writ *Quia præd' J. D. miles est Vicecomes Comit. Cestriae fiat Executio brevis præd. per Coronatores ita qd. Vicecomes se non intromittat. Per Cur.* If the Writ be directed to the Sheriff and he is Party it is good to avoid the doubt to take a Writ to the Coroners: For if the Defendant appears and accepts thereof, and comes in and levies the Fine, he shall never after assign it for Error, *Cro. Car. Done and Smith.*

If a Writ be directed to the Coroners, if there be three they ought all to execute this Warrant, for the same is to be executed according to the direction. And by Coke the difference is, If it be in judicial matters any two of them may do it, if in ministerial, all are to do it, 3 Bulst. 77, 78. *Phelps and Winchcomb. so Holt. p. 70.*

The Plaintiff for the expedition of his Tryal, furnished that he was Servant to the Sheriff of Cornwall, where the Action was brought, and prayed a *Venire* to the Coroners. And the Defendant *non dedixit. Per Cur.* Forasmuch, as if the Sheriff had returned this Pannel, it had been a good Cause to quash the Array for favour, that the Plaintiff to avoid that delay might well shew it, and have Process to the Coroners; and the rather, for that this is a judicial Writ, *Plow. 74. Cro. Eliz. 581. Cham. and Matthew. so in Ejectment vers. 4. who Plead non est* if the Plaintiff suggest, that the Sheriff is of Affinity to one of the Defendants, shewing how; and upon this prays a *Venire fac'* to the Coroners, and the Defendant denies it not, and the *Venire fac'* is awarded to the Coroners; Its well awarded: For tho' none of the Defendants may challenge the Array, for that the Sheriff is of Affinity with

Where and what matters done and executed by one Coroner where there are more shall be good and what not.
4 Rep. 41.
45, 46, 47.
5 Rep.
Longi Case
10 Rep.
103.

Be a great delay 2
Rolls Abr.
668. Fox
and Shit-
pard.

one of the Defendants; yet the Plaintiff ought at the Tryal either challenge the Array and so delay himself, or he ought not to Try this during the time that he is Sheriff, which he would. If the Sheriff levy a Fine, the VVrit of Covenant must be directed to the Coroners, 1 Roll. Ab. 797. *Done and Simthart. Cro. Car. 416. Mesme Case, Jones p. 343. Mesme Case* and this Clause was in the end of the VVrit, *quia præd. Johannes Done miles est Vicecomes Comit. Cestriae fiat Execut. brevis præd. per Coronatores ita qd. Vicecomes non se intro-mittat.*

In a thing which concerns the Sheriff, and his Interest, *Venire fac.* ought to be awarded to the Coroners, *Cro. Fac. 551. Loader and Samuel.*

The Sheriff who was Lessor to the Plaintiff was Master to one of the Coroners in Ejectment; the cause was alledged and confessed, and *Venire fac'* issued to the Coroners *ita qd.* the Servant should not intermeddle, *Moor 625. no. 853.*

A Return of a *Venire* by three Coroners, where are four, its Error at Common Law, but holpen by the Statute, *Hob. p. 70.*

Venire fac' was awarded to the Sheriff, which was quasht for favour of the Under-sheriff, who returns the Pannel and a new *Venire fac'* awarded to the Sheriff *ita qd'* the Under-sheriff *ne se intro-mittat.* Its no Error, tho' it be not directed to the Coroners, 1 Roll. Rep. 272. *Walters Case.*

Venire fac' not to be awarded to the Coroner, till there be a default in the Sheriff, 1 Roll. Rep. 364.

Venire fac' may be awarded, if the first be quasht for favour in the Under-sheriff, 1 Roll. Rep. 272.

The Authority of a Coroner, and of what things he may enquire, &c. and the Order of such Enquiry, and of what not, 4 Rep. 41. *Walkers Case*, *Heydon* 45. *Vaux's Case*, and *Wig's Case*, 5 Rep. 109. *Foxly's Case*.

The Coroner may on *Estrepment* provide against Wast by taking the *Posse Comit. Heb.* 89. in Wast brought by the Sheriff, *Earl of Cumberland vers. Countess Dowager*.

As the Sheriff in his Tourn may enquire of all Felonies by the Common Law, saving the death of a Man; so the Coroner can enquire of no Felony, but of the death of a Man, and that *super visum Corporis*. He shall also enquire of the Escape of the Murderer, of *Treasure Trove*, *Drondans*, and Wrecks of the Sea. He ought to deliver the Inquisition of death taken by him at the next Gaol delivery, or certifie the same into *B. R.* He hath power to bind over Witnesses to the next Gaol delivery in that County: Besides the Judicial place, he hath Office ministerial as a Sheriff, *viz.* when there is a just exception taken to the Sheriffs, judicial Process shall be awarded to the Coroner to execute the Kings Writs.

The Sheriff put in his Challenge to have a *Venire fac'* to the Coroners, because the Sheriff was his Master, and concludes not *& issint* favorable. Yet its good, *Moor. p. 470. no. 853.*

The Parties being at Issue a *Venire fac.* was awarded to the Sheriff, and afterwards upon Entry *quod vicecomes non misit berve*, a *Venire fac'* was prayed and awarded to the Sheriff, the Plaintiff had admitted him to be a person qualified to make the Return. But *per Cur'*, Because that being awarded upon the Roll is but as a Continuance, and there was not any *Venire fac.* taken forth, and its but matter of Form to make such a Continuance, It was held well enough;

The Office and Duty of Coroners, &c.

*Cro. Jac. 35. Willoughby and Egerton, Cro. El. 853.
Cro. Jac. 35.*

Upon Challeng to the Sheriff a *Venire fac.* was awarded to the Coroners and returned, and at the *Nis. Prius*, a *Tales* granted by the new Sheriff, its Error, *Mo. p. 356. n. 482. Morgan and Wye*, it was held a manifest Error, *Cro. El. 894. Corn and Passow*, and not aided by the Statute of Misconveyance of Process: For its a Mistrial.

Process once directed to the Coroners, shall never after in the same Cause be directed to the Sheriff, tho' the same Sheriff which first was be removed, *Mor. 356. n. 422.* But a *Quare* is made of this in *Hob. 64. Webb's Case.*

Demeanor of Coroners as to Outlawrys.

Outlawry was reversed, because the Names of the Coroners was not put to the Judgment, 1 *Rolls Rep. 266.*

In Outlawry the Judgment was *Ideo per iudicium A.B. &c. Coronat. Utlegat' est*, and saith not *Coronat' Comit' præd'*, and for this the Outlawry reversed, 2 *Rolls Rep. 82.*

Coroners are Judges in Outlawries in County, Courts, 4 *Rep. 72. Minton Case, 9 Rep. 119. Lord Sanchar's Case.*

The Statute of 4 *Ed. 1. de Officio Coronatoris*, provides that such Inquest shall be *villarum proximi adjacent. Per Cur.* its not requisite to shew they are the next Vills, it shall be intended if the contrary appear not. At the Common Law it is *villarum adjacent.* and this Statute hath no negative words, and so the Tryal at Common Law remains, 2 *Siderfin 144. Barclay's Case.*

Where

Where a Man shall not have Averment against what the Coroner affirms upon his Examination.

The Court agreed a *melius inquirend.* after an Office *post mortem* which is originally to the Sheriff. But after an Inquest of a Coroner *super visum Corporis*, &c. that he died of a Megrin, no *melius inquirend.* can go, the Original not being before the Sheriff, especially not until the Inquest be quashd. And there its but *ad informand.* *Conscientiam* Traversable, as *Barclays* Case, who drowned himself, and the Coroner refused to hear the Kings Witness; and thus in case of miscarriage and quashing the former Inquest, they will grant a new one, 1 *Keb.* 859. the King against *Stanlack.*

Coroners Inquest.

A flight found by the Coroners Inquest is final as to Forfeiture of Goods, and cannot be tryed again, *Hob. p.* 318.

If one is killed in a Village, and the Coroners make no Inquest, the Village must be amerced, 1 *Keb.* 278. *Lord Buckburst*, and if there were an Inquest, it must be returned *per Certiorari*; the Coroner is to Return his Inquisition at the next Gaol delivery, and because he did not, the Court Discharged him, and set 100 *l.* upon his Head, they having found it Murder, 280.

The Coroner ought to sit upon the Body of every Prisoner that dies in Prison, 3 *Instit.* 52, 91.

Where the Body of a *Felo de se* cannot be found, & *trait devant les Coroners*, his Goods shall be Forfeit and found before the Justices of Peace, 1 *Roll. Rep.* 272.

Melius Inquirend' upon the death of a Man directed to the Coroner and not to the Sheriff, because none but Coroners can enquire *super visum Corporis*. But for the Misdemeanor of the Sheriff, it may be quasht and a new one granted; the Coroner must take the Evidence in Writing, and must bring his Examination into Court upon occasion, *Mod. Rep. p. 82.*

Process may be awarded against a Coroner, to come in to mend the Inquisition, or may be served with a Rule to attend to amend matters of Form, but not matters of substance, as the Inquest found *G. Felonice seipsum submers. fuit*, but saith not he cast himself into the Water. But *Felonice submersus* is the Substance, *Siderfin p. 209.* the King and Glover. 225. vers. King and Harrison.

Inquisition before a Coroner, without saying *Legal. homin. Villar. prox adjacent.* but *Legal. homin' Paroch. de A.* yet good.

Commission to the Sheriff (in the nature of a *Melius Inquirendum*) to enquire of the death of a Man when it had been found before the Coroner before is against the Statute of 28 Ed. 4. 9. But there are divers Presidents since that Statute of such Commissions awarded.

The Court was moved for a *Melius Inquirendum*) to be directed to the Coroner of N. to enquire what Goods *T. Felo de se* died posselt of, because the Inquisition returned did only find the Goods he was posselt of in London. *Per Glyn*, Take it, but it must be directed to the Sheriff, because the Coroner has done his Office already, *Stiles 461.* *Blackwell's Case*, and so was *Toornes Case*.

The Coroner may find such a Nuisance as occasions the death of a Man. *Allen. p. 51.* and the Township shall be amerced thereupon, as a breach in a Bridge whereby a Man falls into a River and was drowned.

How

How a Coroner shall be discharged of his Office, and what shall be a sufficient Cause to discharge him, or not, *vide* 5 Rep. 57. *Specor's Case*, 8 Rep. 41. *Greisly's Case*, 9 Rep. *Sir George Reynell's Case*.

The Mayor is Coroner in the City of London, 4 Inst. 250.

But He doth not pronounce Judgment upon Outlawry; but the Recorder, 8 Rep. *City of London*.

The Authority and Credit the Law gives to the Rolls and Records of the Coroner, *vide supra*.

Retorns upon a *Capias* in Process.

Virtute istius Brevis cepi J. W. *infrascriptum* cujus corpus coram Justic' *infrascript'* ad diem & locum interius content' habeo parat' prout breve istud exigit & requirit, &c. Lib. Intri. 109. c.

R. *sinfranomina'* non est invent' in balliva mea, & quoad cap' J. F. *infranom'* mandavi J. S. ballivo Libert' de F. S. qui plenum retorn' habet omnium Brev' & execution' eorundem cui executio istius brevis totalit' pertinet faciend' extra quam Libertatem nulla executio istius brevis inde per me fieri potest, qui quidem ballivus mihi sic respondit quod cepit corpus præd' J. F. cujus corpus præd' R. S. coram Justiciar' dom' Regis *infrascript'* ad diem & locum *infra* content' habebit, Vel sic, qui quidem ballivus null' mihi dedit respons'. Lib. Intri. ibid.

Virtute istius brevis A. B. *infrascript'* captus est per corpus suum & in (tali Prisons) sive Gaola adeo Languidus detent' quod corpus ejus ad diem & locum interius content' habere non possum absq; mortis periculo.

Virtute istius brevis Certifico, quod postquam istud breve mihi liberat' fuit ad capiend' R. T. (& alios Defendentes) in isto brevi specificat' idem R. & alii infranominat' protulerunt mihi breve dom' Regis de supersed. quod huic brevi est consut' virtute cujus supersed. omnino.

These Writs usually are Retorned by the Attorneys themselves, by the consent of the Sheriff.

Nota, Upon a *Capias ad respond. Tardè* is no good Return.

Retorn' sur *Capias ad satisfaciend'.*

Virtute istius brevis mihi direct' capi corpus infranominat' A. B. cujus quidem corpus coram Justic' infra script' (vel coram dom' Rege) ad diem & locum infra contentum parat' habeo satisfaciend' infranominat' C. D. de debito & damnis infra specificat' prout interius mihi Præcipitur, Lib. Intr. 109.

Non est inventus.

Nihil, ibid.

Quod captus est per præcept' dom' Regis.

Quod captus est super Recogn' fait in Cancellat'.

Quod est in Prisona per Cap. ad sat. en Det.

Quod

QUod ante adventum brevis istius præd^r R. D. captus fuit, &c. & in prisoa, &c. detentus virtute cujusdam querelæ vers. ipsum per nomen R.D. in placito debiti super demand^r 20l. in Curia, &c. adfectam J.G. levat^r.

Retorn^r de Levare fac^r.

Virtute brevis istius cepi in manus dom^r Regis quoddam hospitium cum tribus Shopis (in tali loco) ipsius J. T. infra script^r quæ valent per annum ultra reprisas 10l. Et quod prædict^r hospitium cum Shopis præd^r salvo custod^r donec aliud à vobis inde habeo in mandatum.

Retorn of Liberate.

Virtute istius brevis (tali die & anno) liberavi L. S. infranominat^r manerium infra spec^r cum præd^r tenend. sibi & assignat^r suis ut liberum tenementum suum quousque sibi de debito infra script^r una cum damnis misis & expensis quæ in hac parte rationalit^r sustinuit plenar^r satisfact^r fuerit prout istud breve exigit & requirit, Lib: Inr. 598.

Retorn of a Præmunire, vid. Dalt. c. 70.

Retorn^r de Recogn^r extra Canc. Dalt. c. 81.

Retorn^r de Supplicavit, id. ibid.

Presidents of Retorns extra Scaccarium, vide Dalt. c. 82. W. Wilkinson.

The

The Form of a Bond for Appearance.

NOuerint universi per presentes nos A. B. de C. in Com. Warw. gen' E. F. de L. & c. & H. T. de, & c. teneri & firmit. obligari A. B. Mil. Vic. Com. prædict. in quadragint. libris bona & legalis moneta, & c. solvend. eidem Vicecomiti aut suo certo Attornat', & c. (as in other double Bonds.)

CONditio istius Obligationis talis est, Quod si supra Obligatus A. B. compareat personalit. coram dom' Rege (or, coram Justiciariis dom' Regis) apud Westm' (à die Paschæ in quindecim dies) ad respond. K. W. de placito debiti (transgress. ac etiam billæ, & c. detentionis, & c.) [as in the Writ] quod tunc præsens Obligatio vacua & pro nulla habeatur, alioquin in suo robore permanere & vigore.

A Condition to pass an Account, to procure a Discharge for a Sheriff.

THE Condition of, & c. That if the above bounden T. P. his Heirs, Executors and Administrators, do make a true and perfect Account of and for the above-named T. T. his Heirs and Executors, in the Exchequer of our Sovereign Lord the King, of, for and upon all Issues, Charges, Sum and Sums, which be or shall be charged or demanded, of or upon the said T. as late Sheriff of the said County; and do get and procure a sufficient *Quietus est* thereof for the said T. T. his Heirs and Executors. And moreover, do well and truly discharge, save and keep harmless

harmless the said T. T. his Heirs, &c. against our said Sovereign Lord the King, his Heirs and Successors, and all other person and persons, of, for and concerning the said Office of Sheriff, and all the Receipts and Charges thereof; That then, &c.

A Condition for a Bayliff of an Hundred to enter into to the Sheriff, *vid. Presidents in Dalt.* 6115.

A Condition for a Gaoler to enter into, for the safe keeping of his Prisoner, *vid. Dalt. ibid.*

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